83-587
No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

vs.

CLARENCE E. BENNETT ET AL.,
Respondents.

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner

vs.

DAN R. SANDFORD ET AL.,
Respondents

(CONSOLIDATED)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1976 & Supp. V 1981), create a federal treble damage cause of action and a federal forum for garden-variety civil misrepresentation, anticipatory breach of contract, and consumer claims?

2. Does this Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981) compel the federal courts to grant standing, jurisdiction, and a cause of action to consumers who cannot allege any commercial harm proximately caused by a violation of the Act but, to the contrary, seek treble damages for alleged mail fraud?

3. Is a mortgage lender deemed as a matter of law to be "associated with" its borrowers within the meaning of the statute so as to make it liable for their alleged misconduct?

PARTIES IN THE COURT OF APPEALS

The plaintiffs in this case are approximately 400 of the more than 2500 residents of John Knox Village, a retirement community located near Kansas City, Missouri (the "Village"). The defendants are the promoter of the Village, Kenneth Berg; various directors and managers of the Village, including its former attorney and accountant; various corporations affiliated with the Village; and Petitioner here, The Prudential Insurance Company of America ("Prudential"), which is the mortgage lender to the Village.[1]

[1] The dismissal of the complaint against the not-for-profit corporation that operates the Village, John Knox Village, Inc., was affirmed. A complete list of the plaintiffs is set forth in Appendix F hereto. The remaining corporate defendants are: Christian Services International, Inc.; Evangelical Christian Social Services; John Knox Communities, Inc.; National Village Church Center; National Gerimedical Hospital and Gerontology Center; and Westminster Gerontology Foundation, Inc. The other defendants are the accounting firm of Snyder, Grant & Muehling; Kenneth, Jeanne and Irene Berg; Don Williams; George West; G. Dennis Sullivan; A. Glenn Sowders; Jess Garrison; Floyd Sauer; Lee Thomas; Harvey Beck; Jerald Mahanke; Chris Coates; Glenn Smead; Maude Walker; Paul Edwards; James Smith; Harvey Arbonies; Elson Herndon; Mike Swingle; Lottie Jones; Irma Waddell; Ben Weaver; and Lee Felsburg.

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OPINIONS BELOW

The Honorable William R. Collinson in the United States District Court for the Western District of Missouri granted defendants' motions to dismiss, holding that the plaintiffs had failed to state a cause of action under the RICO Act and, therefore, that the federal court lacked jurisdiction. A copy of that opinion, which was not reported, is set forth in Appendix D.

An appeal was taken by the plaintiffs, and on August 11, 1982 a panel of the United States Court of Appeals for the Eighth Circuit issued its decision, reversing in large part and remanding the case for trial. A copy of the panel's opinion, which is reported at 685 F.2d 1053, is submitted herewith as Appendix B. The defendant appellees' requests for rehearing en banc were granted, and on July 11, 1983, the en banc court rendered its opinion and affirmed the panel's result.[2] A copy of the en banc court's opinion, which is reported at 710 F.2d 1361, is submitted herewith as Appendix A.

JURISDICTION

The judgment of the en banc court of appeals was entered on July 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Federal jurisdiction in this case is predicated entirely upon the Racketeer Influenced and Corrupt Organizations Act ("RICO Act" or "Act"), 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981) because there is no other federal question and there is not complete diversity among all the parties.

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[2] Since the en banc court "adhere[d] to the views expressed by the panel", both opinions are discussed herein. *Bennett v. Berg*, 710 F.2d. 1361 at 1361, 1364 (8th Cir. 1983) (affirming and adopting the panel's opinion in *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982)).

STATUTORY PROVISIONS INVOLVED

This case turns on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981), which is set forth in the Statutory Appendix.

STATEMENT OF THE CASE

Plaintiffs seek to bring their civil fraud case under the treble damages provisions of the RICO Act, even though their case involves neither the racketeering nor the ill-gotten gains at which Congress aimed the treble damage remedy.

The plaintiffs live in a retirement community called John Knox Village. Prudential financed the construction of the Village and has no direct contractual relationship which is at issue here with any of the plaintiffs. Although most of them have continued to reside in the Village and receive its promised services, plaintiffs here claim that the value of their non-transferable occupancy agreement is less than they had anticipated. To attempt to bring their claims under the Act, plaintiffs accuse the thirty-three defendants of mail and wire fraud in connection with the sale of the occupancy agreements; they also accuse various defendants of misconduct in the management of the Village. Plaintiffs' theory of action is nothing more than a garden-variety claim for misrepresentation, anticipatory breach of contract, breach of fiduciary duty, or violation of Missouri consumer protection laws. The proper forum for those claims is the state courts, and the remedy, if any, is under state law.

REASONS FOR GRANTING THE WRIT

I. A DEFINITIVE INTERPRETATION OF THE CIVIL PROVISIONS OF THE RICO ACT BY THIS COURT AT THIS JUNCTURE IS NECESSARY TO CORRECT ERRONEOUS PRECEDENT.

This first en banc consideration of the civil aspects of the Racketeer Influenced and Corrupt Organizations Act presents

substantial issues of law and public policy which call for clarification by the Supreme Court of the United States. Congress drafted the RICO Act to provide additional weapons in the continuing fight against organized crime, *see United States v. Turkette*, 452 U.S. 576 (1981); the decision in this case will determine the use of that Act as a weapon in civil litigation against businessmen who are in no way comparable or related to organized crime. In so doing, this case will set the boundaries for a new basis of federal jurisdiction under which garden-variety civil cases arising under state law may be shoehorned into the already burdened federal courts.

The growing number of cases involving one or more of the issues presented here, and the division among the courts in their results, graphically demonstrate why the Court should grant a writ of certiorari in this case.

The case at hand turns on fundamental questions of application of the civil remedy provision of the RICO Act which will also determine the result in numerous other cases. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982). *See also* Press & Clausen, *The Long Reach of RICO*, Newsweek (Sept. 5, 1983). This case, however, is among those which are getting the jurisprudence of civil RICO off to a false start, and it presents a clear opportunity for this Court to guide the development of the law of civil RICO, as it has guided the development of criminal RICO law in *United States v. Turkette*, 452 U.S. 576 (1981).

A. Summary of Legal Issues — The Target of the Act Is the Importation of Racketeering Funds and Tactics Into the Business Community, and its Treble Damages Remedy Should Not Be Extended to Consumer Fraud Cases.

The Act's substantive provisions speak directly to the investment of tainted funds from criminal enterprises in the legitimate marketplace, and the civil remedy provision aims to divest the criminal of his "ill-gotten gains." *United States v. Turkette*, 452 U.S. at 585.[3] Section 1962(a) prohibits the investment of income from a pattern of racketeering; section 1962(b) prohibits the maintenance of an investment by criminal tactics; and section 1962(c) prohibits the conduct of a business through such tactics. Section 1964(c) provides treble damages for a person "injured in his business or property by reason of a violation" of those sections. 18 U.S.C. § 1964(a). *See Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983).

Prudential's mortgage loan to the Village simply does not fall within these categories. There is not, and could not be, any allegation that the money loaned to the Village by Prudential had been derived from criminal activities; Prudential's loan and mortgage are maintained by ordinary commercial law until the loan is repaid.

Courts have recognized that the broad terms of the statute, if read literally, seem to create a "runaway treble damage bonanza for the already excessively litigious." *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir. 1983), *petition for cert. filed*, No. 83-

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[3] Senator Hruska said that "this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods." 116 Cong. Rec. 602 (1970)(remarks of Sen. Hruska)(quoted in *United States v. Turkette*, 452 U.S. at 259 n.13).

539 (U.S. Sept. 29, 1983).[4] The *Bennett* court, like the Seventh Circuit and the Second Circuit but unlike many district judges, misread this Court's ruling in *Turkette* as prohibiting the courts from sensibly setting the parameters of the Act at their intended reach. *Bennett v. Berg*, 685 F.2d at 1064 (panel opinion); *Moss v. Morgan Stanley, Inc.*, No. 83-7120, slip op. at 6342 (2d Cir. Sept. 9, 1983) *Schacht v. Brown*, 711 F.2d at 1353. The court below, therefore, went astray on the threshold question of whether the Act provides a federal cause of action and federal jurisdiction for simple fraud cases.

The definitions in the Act are broad and plain. The definition of "enterprise" includes, for example, "any individual, partnership, corporation, association . . . ," and the definition of "racketeering" lists "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic . . . drugs which is chargeable under state law [and] . . . any act which indictable under any of the following [thirty-one] provisions of title 18, United States Code . . . or any offense involving bankruptcy fraud, fraud in the sale of securities or the felonious manufacture of narcotic drugs . . . ." 18 U.S.C. § 1961(1), (4). Commission of any two of the crimes listed above in a ten year period constitutes the basic component of a "pattern of racketeering." 18 U.S.C. § 1961(5).

When the Act's sweeping definitions are loosely strung together with allegations of interstate commerce and injury, a RICO cause of action has been stated under the *Bennett* rationale. Thus, under the *Bennett* decision, Section 1964(c) creates a new federal cause of action for mail fraud.

Prudential respectfully submits that this Court has the power to formulate a common sense application of the treble damage

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[4] Some of the issues raised in the petition for certiorari filed in *Schacht v. Brown* by the accounting firms and reinsurance company are raised by Petitioner here, a mortgage lender.

provision of the Act which is in accordance with Congress' purpose and which will avoid the unfortunate results of the *Bennett* decision. *United Housing Foundation v. Forman*, 421 U.S. 849 (1975). One element of a sound reading of the RICO Act civil remedies is the concept of racketeering enterprise injury, which reflects the clear statutory purpose to compensate only those whose loss was directly caused by the use of racketeering tactics or funds in the conduct of a business. This point was expressly left undecided by the Second Circuit in *Moss v. Morgan Stanley* and can appropriately be decided by this Court in this case. *Moss v. Morgan Stanley*, No. 83-7120, slip op. at 6340 n. 16.

B. The Courts Have Recognized The Undesirability of Overly Literal Application of the Act But Have Erroneously Believed Themselves Helpless to Avoid Those Results Under This Court's Decision in *United States v. Turkette*, 452 U.S. 576 (1981).

The Seventh and Eighth Circuits have erroneously read *Turkette* as precluding the federal courts from setting common sense boundaries to the Act's civil remedies. That reading overlooks this Court's express holdings that the correct interpretation of the Act must be consistent with congressional purpose and that "absurd results are to be avoided." *United States v. Turkette*, 452 U.S. at 580.

In *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), which was decided before *Turkette*, the Eighth Circuit had recognized the danger under the RICO Act of "pervasive intrusion upon state and local law" in the area of criminal prosecution and held that "[c]ertainly Congress did not silently intend such a drastic reshuffle of the federal-state balance . . . ." *United States v. Anderson*, 626 F.2d at 1370.

In *Bennett v. Berg*, the Eighth Circuit panel, however, looked to *Turkette* and said: "Insofar as the door of the federal courthouse is similarly opened by RICO in a civil context, we

are cautioned by the Supreme Court that broad Congressional action should not be restricted by the courts in the name of federalism. . . . It is beyond our authority to restrict the reach of the statute." *Bennett v. Berg*, 685 F.2d at 1064 (panel opinion).

Similarly, the Seventh Circuit cited *Turkette* in holding that: "The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime." *Schacht v. Brown*, 711 F.2d at 1361 (citing *United States v. Turkette*, 452 U.S. at 586-87).

Prudential respectfully maintains that this Court has the power to interpret federal statutes in accordance with their clear purpose. The question is not one of federalism but one of sound statutory interpretation. This Court has made clear that the literal language of a broad statute need not be slavishly followed if the result would be absurd. In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), for example, the Supreme Court expressly refused to permit a suit concerning cooperative housing to be maintained under the securities laws, even though the action could be wedged into the literal language of the statute, where the purpose of the law was not served by the suit. The Court cited the familiar rule that a "thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *United Housing Foundation v. Forman*, 421 U.S. at 849. That rule has been quoted and correctly applied by district courts in dismissing unwarranted RICO cases. *Noland v. Gurley*, 566 F. Supp. at 217; *Adair v. Hunt International Resources Corp.*, 526 F. Supp. at 736, (N.D. Ill. 1981). But see *Schacht v. Brown* 711 F.2d at 1356.

As is discussed below beginning at page 13, a rational guideline to the boundaries of the Act's civil remedies consists in affording a RICO civil remedy only to those who have suffered a racketeering enterprise injury.

C. The *Bennett* Holding Will Increase Radically The Burdens On The Federal Court System By Recognizing A New Basis For Federal Civil Jurisdiction And A New Federal Cause Of Action.

The error of stretching the Act beyond its intended reach can be seen in the drastic effects of such a literal application upon federal jurisdiction and law. It is clear, of course, that Congress intended to create a new cause of action and a federal forum for persons directly injured by organized crime's infiltration and perversion of legitimate business. 18 U.S.C. § 1964(c); *Noland v. Gurley*, 566 F. Supp. at 217-18; *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125 (D. Mass. 1982) (citing numerous cases). If the Act is construed to provide a remedy only in that well-defined circumstance, then the increased caseload in the federal courts should not be expected to be excessive. If, on the other hand, the Act is interpreted as in the *Bennett* case to create both a new basis for federal jurisdiction and a new federal cause of action for common law fraud, then many plaintiffs will seek relief in federal court rather than in state court. *See Schacht v. Brown*, 711 F.2d at 1353.

The dramatic increase in filed RICO Act cases illustrates "the all-too-prevalent trend of seeking to reshape the [state law] claim into one that can be wrapped in the RICO mantle." *Fields v. The National Republic Bank of Chicago*, 546 F. Supp. 123, at 124. (N.D. Ill. 1982). The Act's civil remedy permits injured persons to recover three times their damages, which provides both an incentive to the plaintiff and a penalty to those who profit from racketeering by depriving them of the fruits of their unlawful activity. Such incentives and penalties serve an entirely laudable purpose in their proper sphere of operation, but unchecked, they will also provide an incentive for lawyers to file their cases under the RICO rubric, where their only real claim reduces to simple fraud or breach of contract. *See Schacht v. Brown*, 711 F.2d at 1353. Thus, in the *Bennett* case, the tenuous

RICO allegation provides the only jurisdictional anchor for pendent claims arising under state common law and consumer protection statutes, such as the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 et seq. (1978). *Bennett v. Berg*, 685 F.2d at 1057; *see e.g. Fields v. National Republic Bank*, 546 F. Supp. at 1353; *North Barrington Development v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980).

If the RICO Act were properly read as denying federal jurisdiction in such cases, the plaintiffs would not be deprived of an adequate remedy, but they would be compelled to seek that remedy in the natural and proper forum, which is the state courts.

Unchecked, the new damages provision and the creation of a new tort under present RICO Act case law will restructure dramatically the landscape of federal practice in a manner wholly unintended and unforeseen by Congress. See *Bankers Trust Company v. Feldesman* No. 82 Civ. 5590, slip op. (S.D.N.Y. June 29, 1983) (available on LEXIS, Genfed Library, Dist. file).

1. The proposed expansion of federal jurisdiction will shift large areas of state civil law into the federal courts.

The circuit courts have read the *Turkette* decision as requiring the courts to "extend the net of the RICO Act to situations which might otherwise find a remedy only in the state courts." *Bennett v. Berg*, 685 F.2d at 1064 (panel opinion).

This Court held in *Turkette* that Congress enacted the Act "knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law." 452 U.S. at 587.

That holding, however, does not lead to the conclusion that a much greater expansion and transformation of state tort law into federal law must be countenanced. First, the *Turkette* decision was in the narrow context of deciding whether the concept of an

enterprise should be limited to legitimate businesses. 452 U.S. at 576.

Second and more importantly, *Turkette* was a criminal case. An action which is a crime under state law may be one element in a RICO offense "*when the requisite elements of a RICO offense are present.*" 452 U.S. at 586 (emphasis supplied). An alleged violation of state law, therefore, may provide a relatively small component in a RICO indictment. In a civil context, however, under a literal reading of the Act, the federal courts will have jurisdiction over ordinary state tort, contract, and consumer litigation. These changes in jurisdiction and remedies will do far more than "alter somewhat the role of the Federal Government."

Third, in *Turkette*, this Court reasoned that "[t]he view was that existing law, state and federal, was not adequate to address the problem which was of national dimensions." 452 U.S. at 586. In enacting the RICO Act, Congress never suggested, however, that state law was inadequate to provide redress for citizens in ordinary commercial disputes or that there existed a problem of national dimensions in that area.

2. The rationale of the *Bennett* case creates a whole new area of federal jurisprudence by giving the victims of numerous federal and state crimes a civil cause of action.

Although the compensation of victims of crime is certainly a laudable purpose, Congress did not intend the RICO Act as a wholesale provision for such compensation. Rather, Congress intended to create a specific remedy for a specific social harm, which was the invasion of the marketplace by those who would use criminal tactics or the ill-gotten fruits of racketeering in the conduct of their businesses. *See, e.g., Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982). As interpreted by the Eighth Circuit, however, the RICO

Act essentially creates a private right of action for all crimes listed under the definition of racketeering.

In applying RICO's treble damages remedy, a distinction should be drawn between the unfortunate victim of a crime and the businessman or other person whose commercial interests were harmed directly by the conduct or funding of a competing business through criminal methods. As Senator Hruska said: "[T]he bill also creates civil remedies, for the honest *businessman* who has been damaged by *unfair competition* from the racketeer businessman. . . . The *legitimate businessman* does not have adequate civil remedies." 115 Cong. Rec. 6993 (1969) (remarks of Sen. Hruska) (emphasis supplied).

The RICO Act, therefore, does not afford a remedy to the plaintiffs here who are, at most, consumers injured by an alleged mail fraud perpetrated on each of them individually, not by the conduct of the Village's affairs through a pattern of racketeering.

3. The *Bennett* decision and other cases will change adversely other aspects of federal practice.

The treble damages provision of the RICO Act provides an unintended incentive for plaintiffs to supplement the usual lawsuits under complex regulatory provisions with a more dramatic RICO action. Such cases as *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982), suggest that the RICO Act can place an entirely new element into the balance of remedial and reform statutes. Thus, in *Thornton*, a union official charged with misconduct in connection with the union pension fund was sued not only under the usual provisions of federal and state laws but under the RICO Act. The *Thornton* court properly refused to entertain that action. *Thornton v. Evans*, 692 F.2d at n.44.

The temptation for plaintiffs to resort to the Act as a weapon in ordinary commercial litigation also can be seen in cases such as *Moss v. Morgan Stanley, Inc.*, No. 83-7120 (2d Cir. Sept. 9, 1983), *Hokama v. E. F. Hutton & Co.*, Fed. Sec. L. Rep.

(CCH) ¶ 99,415 (C.D. Cal. Aug. 5, 1983), and *Cross v. Price Waterhouse & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 99,153 (D.D.C. Apr. 7, 1983) in which the plaintiffs attempted to transform securities cases into RICO actions; *Cenco v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982), in which the plaintiffs attempted to turn a corporate mismanagement case into a RICO action; and *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983), where the RICO claim became a linchpin in a battle for corporate control.

Moreover, the RICO Act's inclusion of mail fraud as an act of racketeering means that plaintiffs may be able to sue for a loss incurred in a securities transaction without meeting the well-known elements of such provisions as Securities and Exchange Commission Rule 10b-5.[5] 17 C.F.R. § 240.106-5; See *Hokama v. E. F. Hutton*, Fed. Sec. L. Rep. ¶ 99,415 at 96,384; Compare Erlbaum v. Erlbaum [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 at 93,921 (E.D. Pa. 1982).

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[5] The concept of fraud under the mail fraud statute is broader somewhat than the common law notion of fraud. 18 U.S.C. §1341 (1976); *United States v. States*, 488 F.2d 761, 764-65 (8th Cir. 1973). The expansive concept of mail fraud can usefully be compared with the prohibitions contained in the Merchandising Practices Act in Missouri. Mo. Rev. Stat. § 407.010 (1978). The mail and wire fraud statutes say that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . uses the mails or wires commits a crime." 18 U.S.C. §§1341. Section 407.020 of the Missouri Merchandising Practices Act, on the other hand, reads in pertinent part as follows:

> The Act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, is declared to be an unlawful practice. . . .

Mo. Rev. Stat. § 407.020 (1978)

As two courts have forcefully noted,

> It is simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury. While RICO utilizes and sometimes expands upon the offenses designated as racketeering activities, there is no evidence that it was meant to pre-empt or supplement the remedies already provided by those statutes which define a predicate RICO offense.

Noland v. Gurley, 566 F. Supp. at 218 (quoting *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. at 1007-08).

D. One Workable Criterion For Determining Whether A Claim Falls Within The Act's Treble Damages Provision Is That Of Racketeering Enterprise Injury.

The district courts have developed a flexible and workable criterion for appropriately limiting civil RICO suits to those injured by the use of racketeering funds and methods in business, which is the concept of a racketeering enterprise injury.[6] The court in *Moss v. Morgan Stanley*, No. 83-7120, slip op. at 6340, n. 16 collected such cases although it did not decide the issue.

One of the first of these cases was *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, at 209 (E.D. Mich. 1981), where the court agreed that, even if competitive injury is not required, a restrictive interpretation of "racketeering enterprise injury" is appropriate.

In California in 1982, Judge Tashima struck the same theme: "The courts, relying on legislative history, parallels to antitrust law, and policy considerations, have held that treble damages should not be available to plaintiffs whose sole injury stems from

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[6] To the contrary, the *Schacht* court said, "Another major problem with the sort of judicial pruning of RICO's civil provisions, advocated by defendants, where business fraud is alleged is that there is simply no legitimate principled criterion through which to accomplish this distinction." *Schacht v. Brown*, 711 F.2d. at 1356.

the predicate acts of racketeering." *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. at 1006 (footnote omitted); but see *Bennett v. Berg*, 685 F.2d at 1059.

The term "racketeering enterprise injury" is coming to signify the following four judgmental elements:

A. That the term "business or property" at least means commercial or business harm, whether or not it also means competitive harm.

B. That all of the specific elements that are necessary to constitute a violation of RICO must be present.

C. That the injury be "by reason" of the combination of all of these elements, and not merely the proximate result of the predicate acts or even of two or more predicate acts constituting a pattern of racketeering.

D. That the injury must be of the kind the Act was intended to prevent.

Under those elements, plaintiffs' have failed to state a claim under the RICO Act's civil provisions.

E. A Clear Ruling By This Court At This Time Would Promote The Interests Of Justice For The Parties Here And For Other Litigants.

Courts, scholarly commentators, and the popular press have all recognized the potential for unwarranted and coercive litigation created by the widespread civil use of the RICO Act. Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101 (1982); Press & Clausen, *The Long Reach of Rico*, Newsweek (Sept. 5, 1983). The very criminals at whom the Act was aimed at least have the protection of the grand jury system. Yet, an ordinary businessman may be made the subject of a well-publicized and embarrassing accusation of having violated the "racketeering act" simply by the filing of a civil complaint.

II. THIS CASE PROVIDES A TIMELY OPPORTUNITY FOR THIS COURT TO RESOLVE THE QUESTIONS CONCERNING THE ACT'S CIVIL REMEDIES, UPON WHICH THE COURTS HAVE DIVERGED.

Only a few of the pending civil RICO cases have reached the appellate level, but the few existing opinions reveal that the circuit court judges are troubled by the question of the scope of the civil provisions of the Act. The district courts have divided sharply on the issue.

A. Contrary to *Schacht, Moss,* and *Bennett,* Some Appellate Courts Have Expressed Doubts About The Scope of Civil RICO.

In a recent case, the Seventh Circuit upheld the district court's decision that "plaintiffs cannot state a claim against these defendants" under the RICO Act. *Thornton v. Evans*, 692 F.2d. at 1064 (7th Cir. 1982). *Thornton* involved a complicated suit by beneficiaries of a union health and welfare fund, alleging a massive conspiracy "to defraud the Fund of millions of dollars . . . . ." 692 F.2d 1064. The court found that the evidence "traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence." *Thornton v. Evans*, 692 F.2d at 1065.

Two circuit courts have expressed serious doubts as to whether the civil provisions of the RICO Act reach ordinary commercial litigation. *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983); *LTD Commodities Inc. v. Perederij*, 699 F.2d 404 (7th Cir. 1983). In *Dan River*, the Fourth Circuit reversed a district court's grant of a temporary injunction in a hard-fought takeover battle, where that injunction was based in part upon allegations under the Act. The target company's management had attempted to transform its allegations of misconduct under the

securities laws into a RICO Act claim. The court expressed its doubts as follows:

> Finally, we note the mounting controversy in the federal courts over the proper limits, if any, upon the use of RICO in cases far removed from the context which Congress had in mind when it enacted the statute. Congress was out to attack the problem of organized crime, not the problems of corporate control and risk arbitrage.

Dan River, Inc. v. Icahn, 701 F.2d at 291. The Fourth Circuit did not need to decide the RICO issues but observed that the dubious nature of those claims so affected the probability of success as to be one ground for denying a temporary injunction.

The Seventh Circuit followed the same reasoning in *LTD Commodities, Inc. v. Perederij*. In that case, the appellate court sustained Judge Shadur's denial of a temporary injunction based on RICO Act claims. Significantly, Judge Shadur has twice held that the RICO Act civil provisions do not provide a new remedy for ordinary commercial disputes. *Fields v. National Republic Bank of Chicago*, 546 F. Supp. 123 (N.D. Ill. 1982); *Salisbury v. Chapman*, 527 F. Supp. 577 (N.D. Ill. 1981). Like the Fourth Circuit, the Seventh Circuit in *LTD Commodities* did not rule on whether the RICO Act could afford a remedy in the circumstances but upheld denial of an injunction based in part on the improbability of such a claim. *LTD Commodities, Inc. v. Perederij*, 699 F.2d at 409. (citations omitted).[7] See also *The*

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[7] In both the *Dan River* and *LTD Commodities* cases, dissents were entered. In *Dan River*, supra, Senior Circuit Judge Butzner wrote "I cannot subscribe to the notion that it is the function of the courts to exclude white collar, corporate crime from the liability imposed by Section 1964(c). Complaints about the scope of the Act should be addressed to Congress." *Dan River, Inc. v. Icahn*, 701 F.2d at 293 (Butzner, J., dissenting). In the *LTD Commodities* case, however, Judge Pell simply noted without discussion that jurisdiction was based on the Act "notwithstanding that the allegations basically concerned an ordinary commercial dispute between contracting businessmen. . . ." *LTD Commodities v. Perederij*, 699 F.2d at 409 (Pell, J., dissenting).

Trane Company v. O'Connor Securities, No. 83-7336, slip op. at 5 (2d Cir. Sept. 19, 1983).

In *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied* 103 S.Ct. 1177 (1982), the Seventh Circuit refused to permit a RICO civil action by a company's auditors against their client. In that case, the auditors allegedly failed to discover and prevent a fraud by Cenco's management. Cenco sued its accountants, who cross-claimed on the ground that they too had been victims of the fraud. The court held that the RICO action was properly dismissed, noting:

> It is unlikely that Congress if it had adverted to the issue would have chosen to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation, especially when many of these would inevitably be, as here, the witting or unwitting tools of the violator.

Cenco Inc. v. Seidman & Seidman, 686 F.2d at 457.

Further, in *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295 (5th Cir. 1983), the Fifth Circuit held that a release which barred various antitrust claims also barred the plaintiff's RICO claims.

Prudential respectfully submits that the case at hand presents an appropriate opportunity for this Court to provide guidance to the lower courts on the scope of civil RICO.

B. The Appellate Courts Have Also Disagreed On The Role Of An Enterprise As A Defendant And Have Not Consistently Applied This Court's Holding In *Turkette*.

In *Turkette*, the Court ruled on the difficult and often-litigated issue of the nature of an enterprise within the meaning of the Act, holding that "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." 452 U.S. at 576.

The appellate courts, however, have continued to diverge on the nature of the enterprise and its role in the structure of the

RICO Act. In two cases, the courts had no difficulty in identifying at least one enterprise within the statute's encompassing definition; the difficulty has been the role of the enterprise in the litigation.

In *Bennett*, the en banc Eighth Circuit held that the Village could not simultaneously be an "enterprise" and a "person" who conducts an enterprise; therefore, the plaintiffs' complaint against the Village as a culpable person failed because no separate enterprise was alleged. *Bennett v. Berg*, 710 F.2d. at 1363.

Prudential respectfully submits, as it argued to the court below, that the plain language of the statute does contemplate two separate entities — a person and an enterprise operated by that person — because separate but similar definitions are given for "person" and "enterprise." 18 U.S.C. § 1961(3) and 1961(4). That reasoning is parallel to this Court's in *Turkette*. Yet, if the *Bennett* result is followed, will the civil remedies of the Act effectively divest the enterprise of its ill-gotten gains as this Court has interpreted the purpose of the Act in *Turkette*?[8] *See United States v. Turkette*, 452 U.S. at 585.

The court in *United States v. Hartley*, however, disagreed with the Eighth Circuit, based on its reading of *Turkette* and its observation that the definitions of "person" and "enterprise" overlap, and reasoned that a corporation, for example, could be both an enterprise and a person within the meaning of the Act; a corporation could be both an enterprise and a defendant in a criminal RICO action. *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982). See also *Schacht v. Brown*, 711 F.2d at

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[8] The answer to this question is complicated by the fact that the Village, like the accounting firm in the *Cenco* case, is alleged to have had several roles in the event at issue; it is alleged to have been simultaneously a participant in the frauds; the recipient of the funds obtained by those claimed misrepresentations (and to that degree the beneficiary of the fraud); and also the victim of corporate misconduct by other defendants.

1359-60; *Moss v. Morgan Stanley*, No. 83-7120, slip op. at 6344-45.

This ambiguity should properly be resolved by the Supreme Court, and to the extent that the difficulty arises from the language in *Turkette*, the Court can properly issue additional guidance to the lower courts.

C. In Deciding That The Plaintiff Consumers Have Standing, The *Bennett* Court Applied Antitrust Precedent Improperly; The Plaintiffs' Alleged Harm Was Not Caused By A Violation Of The Act.

Prudential respectfully submits, and will argue more fully in its brief to this Court if certiorari is granted, that the plaintiffs do not have standing under the RICO Act.

Since *Turkette* was a criminal case, that decision did not speak directly to the scope of the civil provisions, but the Court said, "The aim is to divest the association of the fruits of its ill-gotten gains." 452 U.S. at 585. The Seventh Circuit looked to *Turkette* and correctly noted that the critical determinant with regard to standing is that " 'the primary purpose of RICO is to cope with the infiltration of legitimate businesses.' " *Cenco Inc. v. Seidman & Seidman*, 686 F.2d at 457 (quoting *United States v. Turkette*, 452 U.S. at 591). From that correct starting point, the Seventh Circuit soundly reasoned that the RICO civil remedy was created for the owners of businesses. The court noted in a passing remark that "perhaps also consumers and competitors" might have a remedy under RICO, although that question was not before the court. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d at 457.

The private civil action provision of the RICO Act was deliberately drafted in the familiar form of the antitrust laws, and both provide a remedy for those whose "business or property" is injured by reason of a violation of the statutes. 18 U.S.C. § 1964(c); *Bennett v. Berg*, 685 F.2d at 1058. In the case of the antitrust laws and the RICO Act, harmonious and clear

development of the decisional law is especially important because the two statutes may well be invoked by the same plaintiffs in the same action. See *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d. 1295 (5th Cir. 1983).

The Eighth Circuit declined to follow antitrust precedent on the issue of standing, and the panel said:

> We acknowledge that RICO was intended in part to combat the threat posed by racketeer influences in the free market system ... In a RICO context, there are few countervailing reasons to lessen the impact of RICO remedies by importing the limitations on standing which apply in antitrust law. In other words, although RICO borrowed the tools of antitrust law to combat organized criminal activity, we do not believe the RICO Act was limited to the antitrust goal of preventing interference with free trade.

Bennett v. Berg, 685 F.2d. at 1059; (citations omitted). *See also Schacht v. Brown*, 711 F.2d. at 1357.

Not surprisingly, therefore, the Eighth Circuit's reasoning on the issue of standing conflicts with this Court's decisions in *Blue Shield of Virginia v. McCready*, 457 U.S. 465; 73 L. Ed. 2d 149 (1982), and *Reiter v. Sonotone*, 442 U.S. 330 (1979). In *Reiter v. Sonotone*, for example, the Court held that a purchaser of a hearing aid had standing under the Clayton Act if the price was "artificially inflated *by reason of the anticompetitive conduct complained of*...." 442 U.S. at 339 (emphasis added). Similarly, in *Blue Shield v. McCready*, the Court noted that "it bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration." 73 L.Ed. 2d at 160, n.13. In that case, the court looked to the "physical and economic nexus between the alleged violation and the harm to the plaintiff and ... more particularly to the relationship of the injury alleged with those forms of injury about which Congress was likely to be concerned." *Blue Shield v. McCready*, 73 L. Ed. 2d at 160.

If the RICO Act is interpreted analogously to the Clayton Act, the plaintiffs here lack standing. They have not been injured in their business, and their only alleged property injury, unlike the plaintiffs in *Blue Shield v. McCready* or *Reiter v. Sonotone*, was not caused by conduct proscribed by the Act. *See also, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). As the court noted in *Van Schaick v. Church of Scientology*,

> Yet we believe that ["business or property"] must be read with the statute's primary purpose — to protect legitimate businesses from infiltration by racketeers — in mind. Thus, in construing "property" courts should be sensitive to the statute's commercial orientation and to Congress' obvious intention to restrict the plaintiff class. We do not believe Congress intended § 1964(c) to afford a remedy to every consumer who could trace purchase of a product to a violation of § 1962.

Van Schaick v. Church of Scientology, 535 F. Supp. at 1135-37. (*citing Salisbury v. Chapman*, 527 F. Supp. 577; *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207).

The plaintiffs do not run the Village as their business, nor do they own a competing retirement community, so they cannot be said to have been injured in their "business."[9] The plaintiffs are not the owners of the Village, nor are they investors in it; their occupancy agreements may not be transferred or inherited. To the extent their contracts are being performed, the plaintiffs' only allegation resembling a property loss is that the value of those contracts has decreased because of mismanagement and corporate misconduct at the Village. *Bennett v. Berg*, 685 F.2d. at 1058. Thus, their alleged loss flows from an entirely different

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[9] The plaintiffs' case can be compared with that of *Spencer Cos. v. Agency Rent-a-Car, Inc.*, F. Sec. L. Rep. (CCH) ¶ 98,361 (D. Mass. 1981), where the court held that a RICO (civil) claim was stated by plaintiffs who alleged a business injury caused by defendants' use of racketeering activity to acquire an interest in their business.

cause and is only indirectly related to the alleged mail fraud or violation of the Act.[10]

D. The Term "Associated With" Should Not Be Read To Include A Mortgage Lender.

The en banc Eighth Circuit held that a mortgage lender was "associated with" an enterprise within the meaning of the statute but went on to hold that such association alone was not sufficient for liability under the Act. Rather, the court correctly held that the Act also requires that a person "associated with" an enterprise also "participate in the conduct of the affairs of an enterprise through a pattern of racketeering." *Bennett v. Berg*, 710 F.2d. at 1364.

Prudential respectfully maintains that the latter holding was correct but that the court below misread the term "associated with." Section 1964(c) prohibits anyone "employed by or associated with" an enterprise from conducting its affairs through criminal methods. Thus, under the rule of *eiusdem generis*, the term "associated with" should be read to encompass relationships analogous to employment, such as agency, and not to include other business or social relationships.

Prudential is indisputably not an employee of the Village, and its only "association with" the Village is its status as a mortgage lender. If plaintiffs are correct, any lender who exercises any oversight of its borrowers' finances, which is certainly a common activity in substantial loans, may be sued by a customer of the borrower because that borrower was mismanaged. Certainly,

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[10] Further, the plaintiffs in the case at hand allege that they were fraudulently induced to buy their occupancy agreements; even if that were so, and even if they were harmed thereby, which is denied, each plaintiff was harmed only by one individual, underlying, misrepresentation, not by the operation of the Village through a repeated pattern of racketeering or by the investment of ill-gotten funds in the Village. Indeed, the plaintiffs here complain that their contracts are worth less than they had hoped because the Village was mismanaged; any loss that they have suffered was not caused by the alleged fraud at all, but by simple corporate misconduct.

there is no evidence that in enacting RICO Congress elevated such a theory to the status of a federal treble damage action. This court should therefore not read the "associated with" element to include wholly legitimate lending relationships.

Finally, Prudential observes that the decision in *Bennett* is consistent with that in *Schacht* on the question of association but inconsistent on the question of participation. *Bennett v. Berg*, 710 F.2d at 1364; *Schacht v. Brown*, 711 F.2d. at 1360. Thus, Prudential agrees with the petitioners in *Schacht* that the *Bennett* decision on the latter point is correct and that certiorari should be granted to resolve the conflict.

E. The District Courts Have Disagreed Even More Widely Than The Circuit Courts On The Basic Issues At Stake Here.

The district courts are divided on the core question of whether and in what form the RICO Act will expand federal jurisdiction and create a federal common law action for fraud.

Some of the district courts have met the issue head on and simply held that the RICO Act was not intended to, and does not, so radically change existing law. In Massachusetts in 1982, Judge Garrity said: "They [cases cited] have consistently concluded that § 1964(c) must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state court." *Van Schaick v. Church of Scientology*, 535 F. Supp. at 1136 (citing *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256 (E.D. La. 1981); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206 (E.D. Mich. 1981); *Kleiner v. First National Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981); *Adair v. Hunt International Resources*, 526 F. Supp. 736 (N.D. Ill. 1981)).

In the *Van Schaick* case, Judge Garrity persuasively argued:

> We do not believe that Congress intended § 1964(c) to afford a remedy to every consumer who could trace a product to a violation. . . . Such an interpretation would open the federal courts to frequent RICO treble damage claims by federalizing much consumer protection law and by inviting plaintiffs to append RICO claims for consumer fraud to nonfederal claims thereby achieving treble damage recovery and a federal forum.

Van Schaick v. Church of Scientology, 535 F. Supp. at 1011. Plaintiffs' case here is precisely the sort of consumer action rejected there.

In *Waterman Steamship Corp.*, the district court reconsidered its first decision on the issue of a RICO cause of action for garden-variety fraud, saying at last:

> To give RICO the broad and unlimited application suggested by [plaintiff] in this case would be to make a travesty of Congress' clear intent to the contrary. *The civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones to conduct their business in interstate commerce into treble damages RICO actions.*

Waterman Steamship Corp. v. Avondale Shipyards, Inc., 627 F. Supp. at 260 (emphasis added).

Similarly in *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20 (N.D. Ill. 1982), the court rejected its earlier holding in the same case, *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645 (N.D. Ill. 1980). In the second *Parnes* case, Judge Shadur put it this way: "But on the civil side the judicial responses have often reflected an uneasiness with RICO's possible swallowing up of all common law fraud, a clearly unintended result reached in a clearly unintended way." 548 F. Supp. at 23. The court reaffirmed its belief in the correctness of

that reasoning when it expressly rejected a plaintiff's attempt to reshape a state law claim into one that "can be wrapped in the RICO mantle." *Fields v. The National Republic Bank*, 546 F. Supp. at 124. Similarly in *Salisbury v. Chapman*, 527 F. Supp. 577 (N.D. Ill. 1981), the same court dismissed a RICO Act claim based on fraudulent nondisclosure. *See also Adair v. Hunt* 526 F. Supp. at 748.[11]

On the other hand, some district courts have held that the literal language of the RICO Act does create a federal remedy for fraud. *See, e.g., Glushband v. Benjamin*, 530 F. Supp. 240 (S.D.N.Y. 1981); and *Dean's Materials Inc. v. Borneman*, 1981 Trade Cases) (CCH) ¶ 64,690 (N.D. Ca. October 21, 1981).

The tension between the well-known and relatively narrow purposes of the Act and its broad language is nowhere more apparent than on the issue of whether the involvement of organized crime is a necessary element in a civil RICO cause of action.

On the one hand, the Supreme Court and the appellate courts have uniformly recognized that Congress' purpose was to deprive organized crime of its financial base. *Bennett* v. *Berg*, 685 F.2d at 1059. On the other hand, the legislative history reveals that Congress deliberately did not use the term "organized crime" in the language of the Act, in part because of the fear that such usage would create an unconstitutional status crime. *Bennett v. Berg*, 685 F.2d at 1063.

One of the first civil RICO cases held that in light of the legislative history's "frequent references to 'racketeers', 'organized crime' and 'organized crime families,' " a cause of action could not be stated against a defendant who "cannot be so characterized." *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109

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[11] The decisions in *Schacht v. Brown* and *Moss v. Morgan Stanley*, of course, may cast doubt on the continued validity of these and district court cases in their respective.

(S.D.N.Y. 1975); Accord *Adair* v. *Hunt*, 526 F. Supp. at 747-8. Although that rule was criticized, some district courts have once again adopted analogous constructions of the civil provisions of the Act. See, e.g. *Hokama v. E. F. Hutton*, Fed. Sec. L. Rep. § 99, 415, at 96, 384-85. But see *Moss v. Morgan Stanley*, No. 83-7120, slip op. (2d Cir. Sept. 9, 1983)

The panel here recognized that judicial and scholarly opinion has been divided on the question of whether a link to organized crime must be alleged under the RICO Act's civil provisions, and it declined to read that element into the statute, citing and discussing numerous cases and articles. *Bennett v. Berg*, 685 F.2d at 1063.

Regardless of whether an allegation of organized criminal involvement is a necessary element of a RICO civil action, the civil provisions of the Act can and should be interpreted to achieve Congress' purposes. Prudential respectfully suggests that a RICO civil suit should not be sustained unless the wrong complained of and the alleged injury suffered are of the kind that the Act was intended to prevent. Only persons who have suffered a racketeering enterprise injury should be afforded a civil remedy under the Act.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In summary, Prudential advances the following three reasons in support of its petition for a grant of certiorari in this case:

1. Unless and until this Court decrees otherwise, the federal courts will be flooded by treble damage claims which are alternately (a) based on nothing more than state common law actions; (b) designed to recover damages for a new federal hybrid action; or (c) simply added to damage claims under existing federal statutes.

2. This case presents in clear-cut and definitive form the principal questions of application of the civil provisions of the RICO Act upon which the courts have diverged; the Court should utilize this opportunity to provide badly needed guidance

on the proper construction and application of *civil* RICO, as it did for *criminal* RICO in *United States* v. *Turkette*, through correcting the erroneous reversal of the District Court by the Eighth Circuit Court of Appeals.

3. This case presents an opportunity for the development of flexible, workable criteria for claims under Section 1964(c) of the RICO Act. Under the racketeering enterprise injury standard, among others, the Act's severe civil remedies will be directed at their intended target and not deflected into unintended areas of federal jurisdiction and law.

CONCLUSION

For the reasons given above, Petitioner The Prudential Insurance Company of America respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

TITLE 18, U.S.C.

CHAPTER 96 - RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

SEC.

§ 1961. *Definitions*

As used in this chapter —

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering

paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in

part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. *Prohibited activities*

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in

which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. *Criminal penalties*

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General.

The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Added Pub. L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

§ 1964. *Civil remedies*

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying

the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. *Venue and process*

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. *Expedition of actions*

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A

copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

§ 1967. *Evidence*

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. *Civil investigative demand*

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the

introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly —

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default

or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon

such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

CLARENCE E. BENNETT, ET AL.,
Respondents.

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

DAN R. SANDFORD, JR., ET AL.,
Respondents.

(CONSOLIDATED)

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CONTENTS

APPENDIX A

APPENDIX A

En Banc Opinion

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 81-1418

Clarence E. Bennett, et al,
Appellants,
v.
Kenneth Berg, et al,
Appellees.
* * *
Dan R. Sandford, Jr., et al,
Appellants,
v.
Kenneth Berg, et al,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 13, 1983

Filed: July 11, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, Circuit Judges, HENLEY, Senior Circuit Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON and FAGG, Circuit judges, en banc.

HENLEY, Senior Circuit Judge.

Plaintiffs appeal the dismissal of their complaints[1] for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). We affirm in part and reverse in part.

[1] This case involves two consolidated complaints which are identical except for the named plaintiffs.

Plaintiffs are present and former residents of the John Knox Village retirement community in Lee's Summit, Missouri. Defendants include the not-for-profit corporation John Knox Village; Kenneth Berg, the founder of the Village; various not-for-profit corporations allegedly controlled by Berg; Prudential Life Insurance Co., mortgage lender to the Village; Snyder, Grant & Muehling, the Village's former accountants; two attorneys formerly employed by various defendants; and certain officers and directors of various defendant not-for-profit organizations.

Plaintiffs brought this action alleging that defendants conspired to, and did in fact, defraud them with the result that plaintiffs face the loss of the "life care" which they expected to receive in return for an initial endowment fee plus a monthly service fee. Counts I and II of the complaint assert claims for relief based on the civil remedies provisions of Title IX of the Organized Crime Control Act of 1970, "Racketeer Influenced and Corrupt Organizations," codified at 18 U.S.C. §§ 1961-68 (1976), hereinafter referred to as RICO.[2] Count I charges all defendants except John Knox Village with participating, and conspiring to participate, in a pattern of racketeering through mail fraud. Count II consists of a prayer for equitable relief against John Knox Village based on the factual allegations in Count I.

The district court granted defendants' motions to dismiss the complaint on the grounds that plaintiffs failed to allege the existence of an identifiable "enterprise," and that the equitable relief sought in Count II is not available to a private plaintiff. A panel of this court, for reasons we adopt, affirmed in part and reversed in part the district court's dismissal. *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982).[3] Briefly, the panel held that plaintiffs have

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[2] Federal jurisdiction is invoked based on the two RICO counts. The complaint also includes a number of pendent state claims.

[3] For a more detailed statement of the case, see the panel opinion.

standing to assert a claim based on RICO's civil remedies provisions; that plaintiffs have sufficiently alleged the existence of an enterprise distinct from the pattern of racketeering; that, with respect to Count I, plaintiffs have sufficiently alleged the existence of an enterprise distinct from the culpable person;[4] that plaintiffs have alleged fraud with sufficient particularity except for certain specified allegations, 685 F.2d at 1062 nn. 14 and 15; and that involvement with organized crime, as that term is commonly understood, is not a necessary element of a RICO claim.[5]

While we adhere to the views expressed by the panel regarding the dismissal of the complaint, we offer the following observations in the interest of aiding the district court and the parties on remand. As noted by the panel, 685 F.2d at 1058, 1061, n. 10, the complaint, which was described by the district court as a "long, rambling discourse," was poorly pleaded and raises serious doubts as to whether plaintiffs will succeed in establishing the requisite elements of their RICO claim against a number of defendants, particularly the following: Prudential Life Insurance Co.; Snyder, Grant & Muehling; Evangelical Christian Social Services; John Knox Communities, Inc.; National Village Church Center; National Gerimedical Hospital and Gerontology Center; Westminster Gerontology Foundation, Inc.; Jess Garrison; Paul Edwards; Elson Herndon; Mike Swingle; and Irma Waddell. In light of these and other statements by the panel, we are confident that on remand plaintiffs may wish to amend their pleadings. *See* Fed.R.Civ.P. 15.

One of the most immediate concerns we have with the allegations against the defendants just mentioned is the questionable

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[4] With respect to Count II, the panel concluded that plaintiffs have failed to allege an enterprise apart from John Knox Village, the only defendant named in Count II.

[5] Because of the panel's conclusion on Count II, see note 4 *supra*, the panel found it unnecessary to address the question of whether equitable relief is available to private plaintiffs under 18 U.S.C. § 1964.

factual basis underlying the claim that each of them participated in the conduct of the affairs of an enterprise in violation of 18 U.S.C. § 1962(c). As the panel noted in footnote 10 of its opinion, RICO forbids persons from conducting the affairs of an enterprise through a pattern of engaging in the predicate crimes. This statement was made in the course of panel consideration of the question whether there were appropriate allegations of "enterprise."

In somewhat different context, the en banc court is concerned that the complaint may be deficient as failing to allege adequately the requisite *degree* of participation in or conduct of the affairs of an enterprise on the part of each named defendant. Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself. *Cf. United States* v. *Mandel*, 591 F.2d 1347, 1375-76 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). However, in light of the fact that this deficiency may not have been directly raised appropriately both in the district court and in this court, and in light of the nature of the complaint and virtual certainty of its amendment, we decline to affirm the dismissal of the RICO allegations in Count I as to any defendant on this ground. We do affirm the statement of the panel contained in its footnote 10 and again observe that it is unlawful for "any person employed by or associated with any enterprise... to conduct or participate... in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" 18 U.S.C. § 1962(c). And, as we said in *United States* v. *Lemm*, 680 F.2d 1193, 1203 (8th Cir. 1982), "[A] RICO conspiracy charge alleges agreement to participate in conducting the affairs of an enterprise through the commission of... predicate acts."

In adhering to the panel's conclusion that plaintiffs' complaint should not be dismissed on 12(b)(6) motions, for emphasis we repeat the panel's suggestion that it may be appropriate for appellees to tender and the district court to consider a Rule 12(e) motion for more definite statement, 685 F.2d at 1061 n. 10. Any such motion may reach any or all of the requisite elements of the RICO claims against any of the defendants.

Indeed, nothing in this opinion should be construed as discouraging the district court on remand from freely considering in the context of appropriate motions questions whether any or all of the defendants should remain in the case until its conclusion on the merits. Certainly, in a complex case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. *Associated General Contractors of California, Inc.* v . *California State Council of Carpenters and Carpenters 46 Northern Counties Conference Board,* 103 S.Ct. 897 (1983).

In sum, the dismissal of Count I and the pendent state claims is reversed; the dismissal of Count II is affirmed; and the case is remanded to the district court for further proceedings in accordance with this opinion.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I concur in the reversal of the district court's dismissal of Count I and the pendent state claims. I agree that plaintiffs sufficiently alleged the existence of an enterprise distinct from the pattern of racketeering and alleged fraud with sufficient particularity except as noted in the panel opinion.

I do not agree, however, that plaintiffs failed to allege in Count II the existence of an "enterprise" distinct from the defendant "person" who conducted or associated with that enterprise for purposes of racketeering. Although careful

amendment[1] of the pleadings on remand as suggested by the panel opinion, 685 F.2d at 1061–62, could circumvent the person-enterprise identity problem, I would reach that question and hold that the corporate defendant, John Knox Village, can simultaneously be named as the enterprise through which the defendant or defendants conducted or participated in a pattern of racketeering. *Cf. United States* v. *Hartley*, 678 F.2d 961, 986-90 (11th Cir. 1982) (criminal RICO action), *cert. denied*, 103 S.Ct. 815 (1983); *see* Blakey, *The Rico Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L.Rev. 237, 324-25 & n. 181 (1982). *Contra Fields* v. *National Republic Bank*, 546 F.Supp. 123, 124 & n. 5 (N.D.Ill.1982) (civil RICO action); *cf. United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (criminal RICO action), *cert. denied*, 103 S.Ct. 729 (1983). Accordingly, I dissent from that part of the majority en banc opinion which concludes that John Knox Village cannot simultaneously be both a person and an enterprise under RICO.

I would also reach the question whether equitable relief is available to private parties under RICO, a question left undecided by the majority en banc opinion, and answer that question affirmatively. As noted by Professor Blakey,

> [S]ection 1964(a) is a general grant of equitable power. It is not limited on its face or in its legislative history. Section 1964(b) grants the government authority to seek relief, an authority that it was necessary to set out lest old learning be

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[1] The panel opinion suggested that plaintiffs in Count II may have intended to place the residential community in the role of the requisite RICO enterprise and noted that the "residential community, so perceived, would arguably be an 'association in fact' for purposes of RICO. 18 U.S.C. § 1961(4)." 695 F.2d at 1061; *cf. United States* v. *Hartley*, 678 F.2d 961, 989 (11th Cir. 1982) (criminal RICO action; problem of identity of person and enterprise would never have surfaced if the government had charged the defendants collectively as an "association in fact" and charged the corporation singly as the enterprise), *cert. denied*, 103 S.Ct. 815 (1983).

> used to circumscribe the new governmental power to seek equitable relief. Nothing in section 1964(b) speaks in negative terms about an authorization for private parties to seek similar relief. Indeed, the governmental suits are to be brought on behalf of private parties. No satisfactory explanation can be offered as to why Congress would have precluded victims from seeking help themselves. Section 1964(c), moreover, says "sue and" and not "sue to." The contrary argument would have to suggest that by adding the right to secure treble damage relief to the general right to sue Congress somehow manifested an intention to subtract the right to obtain other forms of relief. How addition might be converted with subtraction in a remedial statute that must be liberally construed strains even the legal imagination. Section 1964 ought to be read as authorizing both governmental and private suits to obtain equitable relief. To the degree that any ambiguity might be thought to exist in the choice of language, the liberal construction clause and the remedial purpose of the statute come down on the side of finding private suits to be authorized and that full relief can be granted. No satisfactory rationale can be offered, in short, to explain why a court ought to feel itself circumscribed in doing full justice for a victim under RICO.

58 Notre Dame L.Rev. at 331-32 (footnote omitted); *see* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1014, 1038 nn. 132-33 (1980).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

APPENDIX B

Panel Opinion

CLARENCE E. BENNETT, ET AL.,

Appellants,

v.

KENNETH BERG, ET AL.,

Appellees.

DAN R. SANDFORD, JR., ET AL.,

Appellants,

v.

KENNETH BERG, ET AL.,

Appellees.

No. 81-1418.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Submitted: Nov. 10, 1981*

Filed: Aug. 11, 1982

Before HENLEY** and ARNOLD, Circuit Judges, and NICHOL,*** Senior District Judge.

HENLEY, Senior Circuit Judge.

This appeal arises upon the district court's granting of defendants' motion to dismiss for failure to state a claim. Fed. R.

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* As indicated, this appeal was submitted November 10, 1981. However, it was held in abeyance pending decision in *United States* v. *Bledsoe*, 674 F.2d 647 (8th Cir. 1982), and *United States* v. *Lemm*, Nos. 80-1836, and 80-1837 (8th Cir. June 15, 1982).

** Judge Henley assumed senior status on June 1, 1982.

*** The Honorable Fred J. Nichol, Senior District Judge, District of South Dakota, sitting by designation.

Civ. P. 12(b)(6). The case involves two consolidated complaints[1] in which plaintiffs-appellants seek, *inter alia*, treble damages and equitable relief under the civil remedies provisions of the title popularly known as RICO. Title IX of the Organized Crime Control Act of 1970, "Racketeer Influenced and Corrupt Organizations," Pub. L. No. 91-452, §§ 901-904, 84 Stat. 992, 941-48, codified at 18 U.S.C. §§ 1961-68 (1976). Appellants' basic allegation is that their retirement community, known as John Knox Village, has been subject to financial mismanagement and self-dealing such that they are in danger of losing the "life care" which they were promised.

The district court held that appellants' complaint was subject to dismissal because it failed to allege the existence of an identifiable "enterprise" within the meaning of RICO, and because the equitable relief sought by appellants is not available to a private plaintiff. Federal jurisdiction was predicated entirely upon the RICO Act. Dismissal of the RICO counts therefore resulted in dismissal of pendent state claims.

We reverse in part and affirm in part the district court's dismissal.

I. BACKGROUND

Plaintiffs-appellants are present and former residents of the John Knox Village retirement community in Lee's Summit, Missouri. The facility is owned and operated by a not-for-profit corporation of the same name organized under the general corporation law of Missouri.[2] The Village is exempt from federal taxation pursuant to 26 U.S.C. § 501(c)(4), and is exempt from Missouri state and local taxation by virtue of its not-for-profit status.

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[1] The complaints are identical except for the named plaintiffs.

[2] Hereinafter, we refer to the incorporated entity which owns and operates the facility as "John Knox Village," "JKV", or "the Village." We distinguish the retirement facility and its residents as "the community" or "the facility."

The residential community consists of approximately 2,500 residents who occupy units in the facility pursuant to Occupancy Agreement contracts. Under the terms of the occupancy agreements,[3] payment of an initial lump sum, or "Entrance Endowment," entitles a resident to occupy a specific apartment for life. Appellants allege[4] that the endowment fee paid by various plaintiffs ranged in amount from $9,000.00 to more than $50,000.00.

In addition to the entrance endowment, the occupancy agreements call for the payment of a "monthly lodging and/or service charge ... in such amounts as determined by the Board of Directors of the Village." The agreements state that "the Village proposes to provide" some fifty-one services and facilities out of the monthly charges, including tray and diet service, building and grounds maintenance, scheduled transportation service, laundry service and various medical services.

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[3] Plaintiffs' complaints did not attach or incorporate by reference an occupancy agreement. An Agreement, however, has been provided as an appendix to the brief on appeal of defendant-appellee Snyder, Grant, and Muehlig. An agreement is also contained in the record on appeal as an attachment to defendants' memorandum in support of their motions to dismiss, submitted to the district court.

Consideration of the occupancy agreement as a matter outside the pleadings would ordinarily convert a Rule 12(b)(6) motion into a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6) and 56; *Sherwood Medical Industries, Inc.* v. *Deknatel, Inc.*, 512 F.2d 724, 725 n.2 (8th Cir. 1975). The district court, however, expressly noted that no motions for summary judgment were filed. All parties and the district court referred freely to the occupancy agreements, apparently assuming that such extrapleading material could be utilized without automatic conversion of the Rule 12(b) motions into proceedings for summary judgment.

In these circumstances, the motions to dismiss in district court should probably have been converted into speaking motions for summary judgment. However, any error in not treating the motions as motions for summary judgment is harmless.

[4] For purposes of reviewing the granting of a Rule 12(b)(6) motion to dismiss, we accept appellants' factual allegations as true. *Loge* v. *United States*, 662 F.2d 1268, 1270 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 2009 (1982).

Appellants allege that the Village is on the verge of bankruptcy, that services have markedly deteriorated, and that they face the loss of the "life care" which they expected and would have received but for fraud both in the inducement of residents to live in the community and in the operation of the Village. Their complaints in eleven counts stated causes of action for common law fraud under state law; violation of Missouri's Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.* (1978); breach of fiduciary duty; and RICO violations. Only the RICO counts are directly at issue in this appeal.

The complaints include two RICO counts. In Count I, all defendants except John Knox Village are charged with participation in a pattern of racketeering through numerous acts of mail fraud, and conspiracy to engage in such a course of conduct, in violation of RICO provisions codified at 18 U.S.C. 1961(5), 1962(a), (b), (c), and (d). Count II incorporates the factual allegations of County I against John Knox Village with a prayer for equitable relief in the form of reorganization of the Village.

The essence of the scheme alleged is that various defendants fraudulently promoted the retirement community with materially false statements as to the Village's financial soundness and the promise of affordable "life care." Defendants are further alleged to have breached their fiduciary duty in operating the Village through a pattern of self-dealing. Finally, various defendants, including the Village's mortgage lender and former accountants, are charged with conspiracy to conceal the fraudulent promotion and operation of the Village.

The named defendants are the not-for-profit corporation John Knox Village; the founder of the Village, Kenneth Berg (hereinafter "Berg"); various not-for-profit corporations allegedly controlled by Berg; the mortgage lender to the Village, The Prudential Life Insurance Company of America (hereinafter "Prudential"); the Village's former accountants, Snyder, Grant

& Muehling (hereinafter "SG&M"); two former attorneys employed by various defendants; and various officers and directors of the Village and other not-for-profit organizations named in the complaint.

On March 11, 1981 the district court entered an order granting various defendants' motions to dismiss, followed by an unpublished memorandum opinion, order and judgment dismissing the complaints in both actions. The court held that the complaints failed to allege an "enterprise" within the meaning of RICO, and that the relief sought in Count II, a reorganization of defendant John Knox Village pursuant to 18 U.S.C. 1964(a), was not available to private plaintiffs under the RICO Act.

On appeal, appellees renew their contention that (1) appellants failed to allege such "injury to [their] business or property" as is cognizable under RICO, 18 U.S.C. § 1964(c); (2) appellants failed to allege a RICO "enterprise" separate from the "pattern of racketeering"; (3) appellants failed to allege a TICO "enterprise" separate from the "person" or persons who may be culpable under RICO; (4) appellants failed to allege a "pattern of racketeering activity"; (5) appellants failed to allege that defendants "invested" racketeering proceeds in an enterprise, "acquired an interest in" an enterprise through racketeering activity, or "associated with" an enterprise to conduct the enterprise's affairs through a pattern of racketeering; (6) appellants failed to allege that organized crime was involved in their injury; and (7) the equitable relief requested is not available to private plaintiffs.

This litany of grounds for affirmance includes a number of issues of first impression in the Circuit Courts of Appeals. In reversing, we stress that today's decision is rendered on the pleadings without the benefit of a full factual record. Moreover, we are bound by a stringent standard in reviewing a Rule 12(b)(6) dismissal. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations. "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief [citations omitted]." *Fusco* v. *Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982), quoting *Jackson Sawmill Co.* v. *United States*, 580 F. 2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

Pleadings should be construed to do substantial justice. Fed. Civ. P. 8(f). Specificity sufficient to supply fair notice of the nature of the action will withstand a motion under Rule 12(b)(6). *Bramlet* v. *Wilson*, 495 F. 2d 714, 716 (8th Cir. 1974); 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1216 at 120-121 (1969).

We are uncertain whether the facts developed at trial will sustain a cause of action under RICO. We are compelled under these standards, however, to reverse in part the district court's dismissal.

II. DISCUSSION.

A. Standing.

Appellees JKV, Prudential, and SG&M argue as a preliminary matter that appellants failed to allege the kind of injury which supports standing to bring a civil RICO suit. RICO provides that a civil action for treble damages may be brought by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c).

Appellants' complaints alleged several forms of monetary loss. Appellants' entrance endowment payments are alleged to be

worth 10% of what appellants bargained for, due to appellees' alleged conversion to their own use of funds which were deposited in trust for "life care." Monthly service charges are also alleged to be higher than expected due to appellees' unlawful conduct.

Appellees respond that the complaints do not allege a RICO injury for two reasons. First, the complaints are said to assert no breach of contract. Thus they allegedly do not state any injury whatsoever. Alternatively, any injury stated in the complaints allegedly is not an "injury to property" recognizable under the RICO Act. RICO is said to require competitive injury.

We are not convinced. Even if breach of contract is not directly and clearly stated in the complaints, this is irrelevant. Appellants' basic contention is that the value of their occupancy agreements was misrepresented *ab initio*, and that appellees conduct has further lessened the value of their contracts. The essence of this alleged injury is not so much that contractual terms have been breached, but that the value of the contracts is different than appellants were led to expect through extracontractual statements and promises. The allegation sounds as one of injury flowing from fraud rather than breach of contract. Appellants claim essentially to have been deprived of the benefit of their bargain.

Appellees' second argument is somewhat more troublesome. They contend that even if appellants have alleged an injury, they have not alleged an "injury to property" within the meaning of Section 1964(c). Section 1964(c) provides a private cause of action modelled on the antitrust laws. S. Rep. No. 617, 91st Cong., 1st Sess., 80-82, 125, 160 (1969) (hereinafter cited as S. Rep. No. 617); 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska); *id.* at 39,907 (statement of Sen. McClellan); 116 *id.* at 585 (1970) (synopsis of S. 30, 91st Cong., 1st Sess. (1969)); *id.* at 35,916 (statement of Rep. Celler); *id.* at 35,201 (statement of

Rep. McCulloch); *id.* at 36,296 (statement of Sen. Dole). Appellees argue from this fact that the "injury to property" alleged under Section 1964(c) must be an injury to competitive or commercial interests.

This argument has found favor with some courts. *Van Schaick* v. *Church of Scientology*, Civ. Action No. 79-2491-G (D. Mass. March 26, 1982) (requiring commercial harm though not competitive injury); *North Barrington Development, Inc.* v. *Fanslow*, ... F. 2d ....., No. 80-C-2644 (N.D. Ill. Oct. 9, 1980) (requiring competitive injury).

We acknowledge that RICO was intended in part to combat the threat posed by racketeer influence in the free market system. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57, *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4033 (hereinafter cited as H.R. Rep. No. 1549); S. Rep. No. 617; *United States* v. *Turkette*, 452 U.S. 576, 291 & nn. 13, 14, (1981) (and citations to legislative history therein). This does not mean, however, that RICO should be viewed as an extension of antitrust laws in all respects. Different policies underlie the two bodies of law. To ruin an antitrust defendant, usually a legitimate businessman, would generally lessen competition and increase concentration in a particular industry. RICO, on the other hand, is concerned "strik[e] . . . a mortal blow against the property interests of organized crime." 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska). In a RICO context, there are few countervailing reasons to lessen the impact of RICO remedies by importing the limitations on standing which apply in antitrust law. In other words, although RICO borrowed the tools of antitrust law to combat organized criminal activity, we do not believe the RICO Act was limited to the antitrust goal of preventing interference with free trade. Congress did not see the objectives of RICO and the antitrust laws as coterminous. *See* S. Rep. No. 617 at 81–82; 115 Cong. Rec. 6993 (statement of Sen. Hruska); *id.* at 9567

(statement of Sen. McClellan); 116 *id.* at 607 (1970) (statement of Sen. Byrd); *id.* at 35,-193 (statement of Rep. Poff).

We conclude that an allegation of commercial or competitive injury is not required by the RICO Act. *Prudential Lines, Inc.* v. *McKeon,* No. 80 Civ. 5853 (S.D.N.Y. April 21, 1982); *Landmark Savings & Loan* v. *Rhoades,* 527 F. Supp. 206, 208 (E.D. Mich. 1981); *Hellenic Lines, Ltd.* v. *O'Hearn,* 523 F. Supp. 244, 248 (S.D.N.Y. 1981) (RICO does not countenance racketeering activity merely because it is done uniformly among competing concerns); see also Note, Civil RICO; *The Temptation and Impropriety of Judicial Restrictions,* 95 Harv. L. Rev. 1101, 1109-1114 (1982) (hereinafter cited as Note, Civil RICO); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations* (RICO): *Basic Concepts-Criminal and Civil Remedies,* 53 Temple L.Q. 1009, 1040-1043 (1980) (hereinafter cited as Blakey & Gettings, Basic Concepts); Seiling, Standing Rules and the RICO Treble Damage Action, 1 Materials on RICO 533-73 (R. Blakey ed. 1980); but see *Comment, Reading the "Enterprise" Element Back into RICO:* Section 1962 and 1964(c)," 76 Northwestern L. Rev. 100, 125-26 (1981) (private damage suit under RICO may be brought only where there is competitive injury resulting from an "enterprise's" distinct involvement in the racketeering activity) (hereinafter cited as *Comment, Reading the "Enterprise" Element Back into RICO).*[5]

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[5] Appellees' final argument on the issue of standing involves causation. They contend that appellants have failed to allege injury "by reason of a violation of Section 1962," as is required by the facial terms of 18 U.S.C. § 1964(c).

This contention reiterates in new guise the argument that no "enterprise" is alleged in the complaints. Appellees essentially contend that any injury discoverable in the complaints is attributable only to individual acts of mail or wire fraud, rather than a pattern of racketeering conducted through an enterprise. *Compare Landmark Savings & Loan* v. *Rhoades,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981). We conclude to the contrary that Count I adequately alleges

B. "Enterprise" Distinct From the "Pattern of Racketeering."

Turning to the substantive elements of a RICO claim, appellees next contend that the complaints fail to allege the existence of an enterprise distinct from the alleged pattern of racketeering. This contention, and several others that follow, requires attention to the complex syntax of the RICO statute, which appellants have been all too inclined to ignore.

The RICO Act makes it unlawful for any person to conduct the affairs of an "enterprise"[6] through a pattern of racketeering activity.[7] 18 U.S.C. § 1962(c).[8] Significantly, the statute forbids the predicate acts of racketeering only insofar as an "enterprise" is involved. By requiring proof of an "enterprise," RICO requires proof of a fact other than the facts required to prove the predicate acts of racketeering. *United States* v. *Anderson*, 626 F. 2d 1358, 1367 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). RICO is not a recidivist statute with enhances penalties for acts of racketeering that are elsewhere proscribed in the criminal code. *Id.* at 1368 n.17 "The . . . enterprise at all times remains a separate element which must be proved[.]" *United*

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the conduct of the affairs of an enterprise through a pattern of racketeering. See Section B, infra.

[6] An "enterprise" is defined by RICO to include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

[7] Under RICO, a pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.] 18 U.S.C. § 1961(5).

[8] We refer to the substantive prohibitions of Section 1962(c). This is the statutory section under which appellants state their strongest claim. Appellants also allege violations of 18 U.S.C. § 1962(a) and (b). Because we conclude that appellants have stated a claim under Section 1962(c), we do not reach the question whether claims may also be stated under subsections (a) and (b).

States v. *Turkette*, 452 U.S. at 583; *United States* v. *Anderson*, 626 F. 2d 1538.

In the present case, the district court assumed that the enterprise alleged in the complaint, if any, is the corporate entity John Knox Village. The court noted that the complaint portrayed the Village as "pervasively fraudulent." In light of this fact, the court concluded that the Village was not alleged to have an existence apart from the acts of racketeering.

We disagree, although our finding of a RICO enterprise is circumscribed as to Count II for the reasons discussed in Section C.

The complaint alleges and appellees themselves stress that John Knox Village provides numerous legitimate services. As an entity providing such services, and as an incorporated body under the laws of the State of Missouri, the John Knox Village corporation has an ascertainable structure apart from any predicate acts of mail fraud. As we held in *Anderson* and as the Supreme Court noted in *Turkette*, an enterprise may be said to exist where such separateness from the acts of racketeering can be found. Discrete existence, rather than the legality or illegality of the enterprise's activities or goals, is the test. *United States* v. *Turkette*, 452 U.S. at 585; *United States* v. *Anderson*, 626 F. 2d at 1372 ("[W]e do not rest our holding on the word "legitimate" but rather on the need for a discrete economic association existing separately from the racketeering activity.").

An enterprise is particularly likely to be found where, as here, the enterprise alleged is a legal entity rather than an "associational enterprise."[9] Legal entities are garden-variety "enterprises" which generally pose no problem of separateness from

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[9] The RICO Act encompasses two kinds of enterprises: legal entities, and "associations in fact." *United States* v. *Turkette*, 452 U.S. 576, 581-82 (1981). Where a legal entity is alleged as the RICO enterprise, this entity is likely to be clearly distinct from the acts of racketeering. E.g., *United States* v. *Bledsoe*, 674 F. 2d 647, 660

the predicate acts. E.g., *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied sub nom. McGowan* v. *United States* and *Swiderski* v. *United States*, 441 U.S. 933 (1979) (legitimate restaurant serving as front for narcotics trafficking); *United States* v. *Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied sub nom. Greenblatt* v. *United States*, 440 U.S. 909, (1979) (auto dealership); *United States* v. *Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (beauty college); *United States* v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1977) (bail bond agency); *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S. Ct. 775, 42 L. Ed.2d 801 (1975) (foreign hotel and gambling casino).

We conclude that John Knox Village appropriately is named as an enterprise in the complaints for purposes of stating a RICO claim. We do not presently decide whether the various not-for-profit corporations named as an enterprise in the complaints for purposes of stating a RICO claim. We do not presently decide whether the various not-for-profit corporations named in the complaint are also "enterprises" within RICO. We further do not decide whether Kenneth Berg, founder of the Village, or other individual defendants may be enterprises. See 18 U.S.C. § 1961(4) (enterprise includes "any individual"); *United States* v. *Elliott*, 571 F.2d 880, 898 n. 18 (5th Cir.), *cert. denied sub nom. Delph* v. *United States*, 439 U.S. 953 and *Hawkins* v. *United States*, 439 U.S. 953 (1978); *United States* v. *Hawkins*, 516 F. Supp. 1204, 1206 (M.D. Ga. 1981) (single individual may be an enterprise).[10]

(8th Cir. 1982) (co-op, as legal entity, would clearly qualify as enterprise); *United States* v. *Anderson*, 626 F. 2d 1358, 1365 & n. 10 (8th Cir. 1980), cert. denied, 450 U.S. 912, 101 S. Ct. 1351, 67 L. Ed. 2d 336 (1981) (County would necessarily constitute an "enterprise" apart from acts of racketeering, but association in fact of county judges with another for purposes of fraud was more problematic).

[10] In light of appellants' arguments on appeal that all of these entities are RICO enterprises, it may be appropriate for appellees to tender

C. "Enterprise" Distinct From the Culpable "Person."

The RICO Act proscribes conduct in which one party, the "person" subject to the statute, acts upon an entity, the "enterprise," in such a manner that the enterprise's affairs are conducted through a pattern of racketeering.[11] Appellee Prudential separately argues that an "enterprise" was not alleged apart from the "person" who "associated with" an enterprise for purposes of racketeering. We agree as to Count II of the complaints.

Count II is marked by a realignment of the defendant parties. In Count I, appellants seek treble damage relief from all defendants except for John Knox Village, leaving the Village in the role of the "enterprise" affected by the other defendants' allegedly illegal acts. In Count II, equitable relief is sought from JKV. Accordingly, this count places the Village in the role of the "person" responsible for conducting the affairs of an enterprise

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and the district court to consider a Rule 12(e) motion for more definite statement as to the enterprise element.

In the interest of aiding the district court and parties on remand, we offer the suggestion that any amended pleadings should reflect careful attention to the precise language of the RICO Act. Both Count I and Count II are now poorly pleaded. In each count, the defendants are accused of "engag[ing] in 'a pattern of racketeering activity' " in violation of the RICO Act. See paragraphs 82, 85. This statement, taken in isolation, simply accuses the defendants of engaging in the predicate crimes. This is not precisely what the RICO Act forbids. RICO forbids persons from conducting the affairs of an enterprise through a pattern of engaging in the predicate crimes. 18 U.S.C. § 1962(c). *Compare United States* v. *Anderson*, 626 F. 2d at 1362 (quoting indictment which alleged that defendants were persons associated with a named enterprise for purposes of conducting the enterprise's affairs through a pattern of racketeering).

We nevertheless reverse the dismissal of County I because, elsewhere in that count, it is apparant that at least JKV is alleged to be an enterprise.

[11] Section 1962(c) specifically makes it unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity[.] 18 U.S.C. § 1962(c).

through a pattern of racketeering activity. In this formulation, appellants may intend to place the residential community in the role of the RICO "enterprise." The residential community, so perceived, would arguably be an "association in fact" for purposes of RICO. 18 U.S.C. § 1961(4). This allegation, however, has not been clearly set forth. For this reason, we conclude that the RICO claim as stated in Count II against John Knox Village cannot stand. *Van Schaick* v. *Church of Scientology*, Civ. No. 79-2491-G (D. Mass. March 26, 1982). *Compare United States* v. *Hartley*, 678 F.2d 961 (11th Cir. June 17, 1982), reaching a somewhat different result in unique context in a criminal case.

We suggest that on remand appellants should be permitted to amend their complaint, if indeed they fairly may, so as to include some of what is now in Count II, but containing at least an appropraite "enterprise" allegation. Rule 15(a) declares that leave to amend "shall be freely given when justice so requires," and this mandate is to be heeded. See generally 3 J. Moore, *Moore's Federal Practice*, ¶¶ 15.08, 15.10 (1982); *Asay* v. *Hallmark Cards, Inc.*, 594 F.2d 692, 695-96 (8th Cir. 1979). The pleading rules have been interpreted in accord with the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Id.* at 695.

D. Pattern of Racketeering.

Appellees next contend that the complaints fail to allege a "pattern of racketeering." Although "multiple incidents" of mail and wire fraud are alleged, and although racketeering activity includes mail and wire fraud, 18 U.S.C. § 1961(1), the complaints are said to lack the specificity required for pleadings of fraud under Fed. Rules Civ. Proc. 9(b). We find some merit in this argument.

Rule 9(b)[12] requires that "the circumstances constituting fraud . . . be stated with particularity." "Circumstances" include

[12] Fed. R. Civ. P. 9(b) provides: Fraud, Mistake, Condition of Mind.

such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby. See generally 2A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 9.03 at 9-18 — 9-24 (1982).

The complaints state the time, place and content of only some of the defendants' alleged misrepresentations.[13] The location of other allegedly false statements is said to be a "pamphlet," "promotional material," or "a typical life-care contract."[14] These allegations are not sufficiently particular to satisfy Rule 9(b). The complaints also fail to attribute certain false statements to identified defendants. Instead "various other defendants"[15] are alleged to be responsible for the statements. These allegations utterly fail to apprise defendants of the claims against them and the acts relied upon as constituting the fraud charged. See 5 C. Wright & A. Miller, *Federal Practice and Procedure*, 1297 at 404 (1969); *Felton v. Walston & Co.*, 508 F.2d 577, 581 (2d Cir. 1974).

We hold that on remand allegations which fail in particularity, see nn. 14, 15, should be struck without prejudice. Insofar as some paragraphs contain allegations against both identified and unidentified defendants, these paragraphs are otherwise specific in stating the time, place and content of the misrepresentations.

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition or mind or a person may be averred generally.

[13] We refer to paragraphs 40, 42, 43.1, 43.2, 46, 67(a), 67(b)(c)(d), 68 and 70, which identify the time, place, and contents of the alleged misrepresentations with particularity. Paragraphs 54, 57, 58, 59 and 60 are also sufficiently specific to state a claim of fraudulent concealment.

[14] See paragraphs 38, 41, 43, 66(d).

[15] See paragraphs 40, 44, 46, 47, 66(d), 67, 68.

Appellees JKV and Prudential also argue that a pattern of racketeering has not been alleged because no allegations of wire or mail fraud are made. This argument ignores numerous allegations of particular false statements. See n. 13, supra. Use of the mails and wire fraud is also alleged.[16]

In sum, we conclude that a pattern of racketeering was alleged, and that fraud was alleged with sufficient particularity except for the allegations identified in nn. 14-15.

E. Involvement of Organized Crime.

Appellee SG&M finally contends that a RICO complaint will lie only where the involvement of organized crime is alleged. This argument has found some degree of support, *Waterman Steamship Corp.* v. *Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair* v. *Hunt International Resources Corp.*, 526 F. Supp. 736, 746-78 (N.D. Ill. 1981); *Barr* v. *WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975), from courts which may have been swayed by Congress's evident concern with organized crime in the passage of RICO. See *United States* v. *Turkette*, 452 U.S. at 588-93 & nn. 11, 12, 13, 14, 101 S. Ct. at 2531-33 & nn. 11, 12, 13, 14 (and legislative history cited therein); H.R. Rep. No. 1549, reprinted in [1970] U.S. Code Cong. & Ad. News 4007; S. Rep. No. 617; *see also Comment, Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192, 205 (1975).

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[16] Finally, appellees SG&M and Prudential argue that the complaint does not allege the element of a "RICO relationship" between themselves and an enterprise. In other words, these defendants allegedly did not invest racketeering proceeds in, acquire control of, or associate with an enterprise. 18 U.S.C. § 1962(a), (b), (c).

The contention is without merit. These defendants were the mortgage lender and accountant to the Village. They were "associated with" an enterprise.

We are convinced that the better reasoned approach is one which rejects any attempt to interpret RICO as creating a status *offense* aimed only at organized crime in any colloquial sense of that phrase. The legislative history of the Act suggests that RICO is aimed more broadly at organized criminal activity as well. 116 Cong. Rec. 35,344 (1970) (statement of Rep. Poff) (Organized crime "serve[s] simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.") In fact, a restriction of the statute's applicability to organized crime, defined as a specific group of individuals, appeared constitutionally suspect to the bill's sponsor. *Id.* at 35,204 (statement of Rep. Poff). When Representative Biaggi proposed an amendment that would have specifically criminalized membership in the Mafia or La Cosa Nostra, Representative Celler objected that such terms were "imprecise, uncertain and unclear" and that mere membership in an organization should not be punished. *Id.* at 35,343-44 (statement of Rep. Celler, citing *Robinson* v. *California*, 370 U.S. 660 (1962); *Scales* v. *United States*, 367 U.S. 203 (1961); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

We join an increasing number of courts and commentators in concluding that RICO suits are not limited to contexts in which a tie to organized crime is alleged. *United States* v. *Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States* v. *Campanale*, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied sub nom. Matthews* v. *United States*, 423 U.S. 1050 (1976); *Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. at 247-48; *Engl* v. *Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); *Parnes* v. *Heinhold Commodities*, 487 F. Supp. 645, 646 (N.D. Ill. 1980); *United States* v. *Gibson*, 486 F. Supp. 1230, 1240-41 (S.D. Ohio 1980); *United States* v. *Chovanec*, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091, 1096 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1972 (1980); *United*

States v. *Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976); Note, *Civil RICO, supra*, 95 Harv. L. Rev. at 1106-1109; Comment, *Reading the "Enterprise" Element Back into RICO*, supra, 76 N.W.L. Rev. at 100-01 & n. 4; Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 Dick. L. Rev. 201, 242-43 (1981); Blakey & Gettings, supra, *Basic Concepts*, 53 Temple L.Q. at 1013 n. 15; Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in its Interpretation*, 27 DePaul L. Rev. 89, 112 (1975).

We recognize that this conclusion may tend to extend the net of the RICO Act to situations which otherwise might find a remedy only in the state courts. In the present context, for example, appellants are able to avail themselves of a federal cause of action for treble damages under RICO where common law fraud is an alternative claim. However, at least some federalization of state claims was not unanticipated by Congress. As the Supreme Court noted in the context of a criminal prosecution:

> *As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "move[e] large substantive areas formerly totally within the police power of the State into the Federal realm."* 116 Cong. Rec. 35217 (remarks of Rep. Eckhardt). See also *id.*, at 35205 (remarks of Rep. Mikva); id., at 35213 (comments of the American Civil Liberties Union); Hearings on Organized Crime Control before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 329, 370 (statement of Sheldon H. Eisen on behalf of the Association of the Bar of the City of New York). *In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law.*

United States v. *Turkette*, 452 U.S. at 586-87 (emphasis added).

Insofar as the door of the federal courthouse is similarly opened by RICO in a civil context, we are cautioned by the Supreme Court that broad Congressional action should not be restricted by the courts in the name of federalism. *Id.* at 587, 101 S.Ct. at 2531. It is beyond our authority to restrict the reach of the statute. *Id.*; see also Note, Civil RICO, supra, 95 Harv.L. Rev. at 1118-21.

Moreover, in the specific context of this case, it cannot be said that we have opened the floodgates for federal adjudication of every common law fraud claim. RICO is directed only at situations involving an enterprise which engages in or affects interstate commerce. 18 U.S.C. § 1962.[17]

F. Equitable Remedies.

Count II of appellants' complaints requested equitable relief against John Knox Village in the form of reorganization of the Village. Because we affirm the dismissal of Count II as that count now is drawn, we do not reach the difficult question whether, under such facts as may be developed in this case, this equitable relief is available to private plaintiffs pursuant to 18 U.S.C. § 1964 and, if not, whether such relief may be granted under the court's general equitable powers.

We sympathize with the district court's request for guidance on these matters. It would, however, be premature for us to

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[17] In oral argument, the view was expressed that if we recognized appellants' claim as a RICO action, any scheme to defraud executed through two mailings would create a civil RICO claim. This misstates the elements of a RICO offense. Under the facial terms of section 1962, a RICO claim can only be stated where the scheme to defraud involves an enterprise, and where the enterprise is one which "is engaged in, or the activities of which affect" interstate commerce.

The district court here expressly declined to rule on the interstate commerce element of the complaints. The issue is not before us on appeal.

decide these questions not only without a factual record, but also without a pleading which squarely places the issues before us. We note for the information of the parties and the district court such scholarship as we have discovered, without at this time endorsing or rejecting the opinions there expressed. See generally Blakey & Gettings, Basic Concepts, supra, 53 Temple L.Q. at 1014, 1038 nn. 132-33 (indicating equitable relief is available to the private plaintiff).

Because we reverse the dismissal of Count I, and because we suggest that a grant of leave to amend is appropriate as to some material now in Count II, we forego detailed discussion of appellants' allegation that they were wrongfully precluded from filing a curative amendment to their complaints.

The district court's dismissal of Count I and of pendent state claims is reversed. A number of allegations hereinabove identified (nn. 14, 15) are to be struck without prejudice for failure to plead fraud with particularity. The dismissal of Count II as drawn is affirmed, and the case is remanded to the district court for further proceedings in light of this opinion.

APPENDIX C

APPENDIX C

Order Granting Rehearing en banc

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 81-1418 September Term 1982

CLARENCE E. BENNETT, ET AL.,
Appellants,

vs.

KENNETH BERG, ET AL.,
Appellees.

* * *

Appeal from the United States District Court for the Western District of Missouri

DAN R. SANDFORD, JR., ET AL.,
Appellants,

vs.

KENNETH BERG, ET AL.,
Appellees.

Petitions of appellees for rehearing with suggestions for rehearing en banc, having been considered by the Court, are hereby granted.

September 17, 1982

APPENDIX D

APPENDIX D

Opinion of the District Court

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

CLARENCE E. BENNETT, ET AL.,
Plaintiffs,
v.
KENNETH BERG, ET AL.,
Defendants.

Civil Action
No. 80-0381-CV-W-2

AND

DAN R. SANDFORD, JR., ET AL.,
Plaintiffs,
v.
KENNETH BERG, ET AL.,
Defendants.

Civil Action
No. 80-0459-CV-W-2

MEMORANDUM OPINION AND ORDER GRANTING ALL DEFENDANTS' MOTIONS TO DISMISS

The complaints in these two cases are identical except for the named plaintiffs. In the *Sandford* case there are 167 individual plaintiffs and in the *Bennett* case there are 209 individual plaintiffs. However, all the plaintiffs make the same allegations against all of the defendants. All of the plaintiffs are residents of the defendant John Knox Village which owns and operates a retirement community known as "John Knox Village" located in Lees Summit, Missouri. This Village has more than 2500 residents including the plaintiffs. All of the residents have entered into "lifecare" contracts with the defendant John Knox Village under which they paid an initial lump sum for which they received the right to occupy specified housing units in the Village and receive numerous services and benefits for life. In addition to the lump sum payment, they pay a monthly charge,

which apparently from some of the allegations in the complaints can be raised by the Village. There are eight corporate defendants, all but two of which are Missouri not-for-profit corporations. The other two corporations are a Missouri corporation and the Prudential Insurance Company of America, a foreign corporation. There are 22 individual defendants who are alleged to have been officers, directors, or employees of one or more of the corporate defendants, a partnership of three accountants, alleged to have done accounting work and two attorneys alleged to have done legal work for one or more of the corporations.

This 49-page complaint contains 11 counts. Federal jurisdiction of Counts I and II is based on the RICO statute, Title 18, United States Code, § 1961 *et seq.* The complaint contains an allegation that federal jurisdiction of some other counts is based on diversity of citizenship, but there are no allegations concerning this diversity, and, in plaintiffs' briefs in opposition to the motions to dismiss, plaintiffs concede that federal jurisdiction on Counts I and II is based solely on the RICO statute, and that jurisdiction over the remaining nine counts is based on the doctrine of pendent jurisdiction. Therefore, the Court will consider only the motion to dismiss directed to Counts I and II. If these Counts fail to state a claim, the remaining counts will be dismissed for lack of jurisdiction.

All of the defendants have filed motions to dismiss for failure of the complaint to state a claim upon which relief can be granted under Rule 12(b)(6). The Court feels that it would be completely justified in dismissing the complaint under Rule 8(a)(2), which provides that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The first two counts of the complaint comprise 44¼ pages of legal size paper. They plead evidence in detail, setting out verbatim copies of documents which could be exhibits at a trial and they are replete with argumentative statements

and color words. The most cursory reading of these first two counts shows a complete violation of the letter and spirit of Rule 8. However, this point has not been raised by the defendants and the Court is not basing this decision on the above remarks.

Section 1962 of Title 18, United States Code, sets forth the actionable activities under the RICO statute. There are no allegations in the complaint of violations of Subsections (a) and (b) of that Section and although not alleged by a plain and simple statement, the Court must assume that this long, rambling discourse must attempt to allege a violation of Subsection (c). There is an allegation of a violation of Subsection (d) (conspiracy to violate (a), (b), or (c)) which will be discussed later.

Subsection (c) of Section 1962, states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In their motions to dismiss, some of the defendants raised the question that the complaint does not properly allege and that it is obvious that John Knox Village, a large retirement community in the State of Missouri, is not engaged in, nor does its activities affect, interstate or foreign commerce. It is true that there is no specific allegation in the complaint that "the enterprise" is engaged in or conducts activities which affect interstate commerce. One reason for the omission is that the complaint fails to allege what plaintiffs, in order to state a cause of action, must claim to be an enterprise whose affairs are conducted through a pattern of racketeering activity by the defendants.

This Court considered the interstate commerce question as a serious preliminary question and directed the parties to conduct their initial wave of discovery solely on this issue. This discovery has been completed but the Court has concluded that it is not a

proper question to be determined upon motions to dismiss because it would require examination of a great deal of evidence not in the complaint.

There have been no motions for summary judgment on this issue. During all this discovery and the voluminous briefs filed on this issue, all the parties have assumed that "the enterprise" is John Knox Village, a Missouri not-for-profit corporation.

The most puzzling and unusual part of this complaint is that the plaintiffs allege that they each paid for a life-care contract, but do not allege that this contract is in default or that they are not receiving all of the benefits to which they are entitled under that contract. Reading the lengthy allegations of the complaint, the most that can be inferred is that the plaintiffs claim that through mismanagement of the financial affairs of John Knox Village, the corporation is in an unsound financial condition and that they fear that in the future it will be unable to furnish them these services. They also allege that their monthly service charge has been raised (although there is no allegation that this is in violation of any terms of their contract) because of this unsound financial condition. This raises a serious question as to whether the plaintiffs have any standing to bring a suit under the civil provisions of RICO (Section 1964(c)), which states:

> Any person injured in his business or property by reason of a violation of 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the costs of suit, including a reasonable attorney fee.

The plaintiffs do make a conclusory allegation to the effect that the monies they paid for their life-care contract constituted a trust fund which has been wrongfully depleted. There are no allegations that the life-care contracts contained any trust provisions or was any more than a contract to furnish life care, which is still being furnished.

The general import of all the allegations is that all the defendants, including John Knox Village, associated themselves in a scheme to defraud. Paragraph 45 states:

> In fact, however, in the minds of defendant Kenneth Berg, various of the other defendants and others associated with them, the Village was little more than a fraudulent vehicle by which they unlawfully enriched themselves in many ways and for the most part secretly. This they did at the expense and to the great damage of plaintiffs and others who had entered into life-care contracts.

Paragraph 57 states:

> By reason of the foregoing facts, as well as other facts alleged below, the creation of the so called non-profit corporation, John Knox Village, was a sham and little more than a means by which defendant Kenneth Berg, CSI, various other defendants and their associates could further defraud the residents and others, and more effectively conceal their fraud.

The Eighth Circuit Court of Appeals in *United States* v. *Anderson*, ... F.2d .... (8th Cir., Aug. 7, 1980) stated:

> The term "enterprise" must signify an association that is substantially different from the acts which form the "pattern of racketeering activity."
>
> • • • •
>
> With subsection (c), an overly broad construction of the term "enterprise" can render that element of the offense interchangeable with the "pattern of racketeering" element.
>
> • • • •
>
> In the case at bar, the Government proved the enterprise element of the offense solely by evidence indicating an association to commit the pattern of racketeering activity. This interpretation of the statute effectively eliminated the enterprise element of the offense.
>
> • • • •
>
> We hold (enterprise) ... to encompass only an association having an ascertainable structure which exists for the

> purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the omission of the predicate acts constituting the "pattern of racketeering activity."

There is no allegation in this complaint of any enterprise which has ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the alleged fraudulent acts and purposes of the defendants and the predicate acts constituting the pattern of racketeering activity. This Court holds that without proper allegation of an enterprise which exists for the purpose of maintaining operations directed toward an economic goal, the complaint fails to state a cause of action because the only liability of the defendants would be for conducting or participating, directly or indirectly in the conduct of such enterprise through a pattern of racketeering activity or collection of unlawful debt.

In paragraph 77, the complaint alleges:

> (a) During the relevant period herein, all of the defendants engaged in an unlawful scheme and common course of conduct which involved among other things:
>
> (1) The unlawful promotion, solicitation, and sale of life-care contracts in an enterprise which was essentially fraudulent:
>
> (2) The making of numerous untrue and misleading statements of material fact, and the failure to disclose material facts relating to life-care contracts;
>
> (3) The unlawful and fraudulent operation of said enterprise.

These broad allegations encompass all of the defendants, including John Knox Village and charged them all with engaging in an unlawful scheme and common course of conduct. In fact Count II of the complaint (against the defendant John Knox Village

solely) alleges that corporation has engaged in a pattern of racketeering activity and violated Subsections (a), (b), (c), and (d) of Section 1962.

In this connection, the only relief sought against John Knox Village in this complaint is the prayer in Count II which prays for a reorganization of that defendant. The interesting question raised by this Count is that the only statutory grounds for this relief is found in Section 1964(a) of the Act which states that the district court shall have jurisdiction to prevent and restrain violations of Section 1962 by ordering dissolution or reorganization of any enterprise. Subsection (b) provides that "the Attorney General may institute proceedings under this Section."

Subsection (c) provides that: "any person injured in his business or property by reason of a violation of Section 1962" may sue in district court and recover treble damages including a reasonable attorney fee. Defendants argue that Count II states no claim against the defendant John Knox Village because only the Attorney General can institute proceedings under Subsection (a) and individual plaintiffs are limited to relief under Subsection (c). The Court can find no precedent on this question. But, in order to secure guidance, in the event of an appeal, rules that individual plaintiffs such as these can only seek relief under Subsection (c), because if Congress had intended that they could bring an action under Subsection (a), Subsection (c) would have definitely stated this fact. This ruling by this Court standing alone would sustain the defendants' motion to dismiss Count II of the complaint.

There are numerous allegations in this complaint that all of the defendants have associated themselves in a scheme to unlawfully loot the assets of John Knox Village, a part of which assets, it is alleged, consisted of payments for life-care contracts by these plaintiffs. None of those numerous allegations constitute "a pattern of racketeering activity." If these plaintiffs have any standing to bring a suit based on these allegations, it would

obviously have to be a derivative action for restoration of the looted assets to John Knox Village and would be a state court action. In addition to the numerous allegations of mismanagement and waste of these assets, the complaint contains a general allegation that John Knox Village has been insolvent since its inception and was fraudulently represented to all purchasers of life-care contracts as being in sound financial condition. The complaint does allege that "in the furtherance of the aforesaid unlawful scheme and course of conduct, the defendants used, and caused to be used, mail delivered by the United States Postal Service on numerous occasions, right up to the present date, in violation of 18 U.S.C. Section 1341" and similar allegation of violation of the wire fraud statute, 18 U.S.C. Section 1343. These are the only possible allegations in this lengthy complaint of a pattern of racketeering activity.

Broadly construed, the above allegations could be said to allege a scheme to defraud the plaintiffs in the sale and purchase of life-care contracts (and that the mail and telephone were used in furtherance of the scheme). But, each and every defendant is alleged to have committed these predicate acts which constitute a pattern of racketeering activity.

The allegation that all the defendants conspired to violate the provisions of Subsections (a), (b), or (c) of Section 1962 must fail as explained in *United States* v. *Anderson*, *supra*, since it cannot supply the necessary definition of an enterprise, the affairs of which were conducted by the defendants through a pattern of racketeering activity. Since this complaint alleges that all of the defendants have associated themselves to commit a pattern of racketeering activity and there is no allegation of any enterprise which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate actions constituting the pattern of racketeering activity, it is the Court's decision that Counts I and II of this complaint fail to state a claim upon which relief can be granted under the RICO statute

upon which this Court's jurisdiction is based. Jurisdiction of the remaining counts, being based solely on the doctrine of pendent jurisdiction, does not exist in this Court after Counts I and II are dismissed and they are therefore dismissed. *See, United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

It is therefore

ORDERED that the motions of all the defendants to dismiss the complaints in each of these cases for failure to state a claim upon which relief can be granted are hereby granted and the complaints in both actions are hereby dismissed.

.....

WILLIAM R. COLLINSON
Senior United States
District Judge

Springfield, Missouri
March 19, 1981

APPENDIX E

APPENDIX E
List of Plaintiffs

The plaintiffs in *Bennett* v. *Berg* are the following individuals: Clarence E. Bennett, J. Maurice Hoare, Alpha K. Hitchcock, Leona Miller, Joseph B. Butler, Earl L. Vance, Ruth G. McKinley, Hazel L. Aurand, Mayol H. Linscott, M. E. Willmott, Evelyn Thomas, Pat Tawson, Robert T. Bruce, Esther Lamb, Ethel Botzum, Velma P. Davison, C. H. Bull, Edna M. Phillips, Arthur W. Phillips, Bernice Weadock, Dorothy Maughermar, Paul Maughermar, Brook L. Haines, Rowena M. Haines, Jack R. Adams, Thelma G. Adams, Opal T. Werner, Tom A. Smith, Aileen H. Smith, Marguerite Bradley, Charles S. Barger, Gala Sampliner, Frances Kimsey, George E. Sanders, Laura Volberding, Flora H. Vance, Fred D. Pitt, Ruth Pitt, Susan M. Linscott, Jack Tillotson, Elizabeth Thomson, Carmen Leininger, Champ O'Donnell, Cornelia O'Donnell, Willetta Todd, Howard D. Smethers, Marie Miller, Roy L. Stephens, Ruby A. Stephens, W. P. Humston, Eleanor Humston, Milton W. Dunn, Leonette Kincaid, Paul G. Martin, Russell Lovell, S. G. Humphrey, Ethel Perkins, Fred E. Wilbur, Mildred Wilbur, Theo J. Bonsall, Mabel H. Ochtman, Paul E. Pippitt, Uel Sisk, Marian E. Pitrat, Jim Kimsey, Caroline A. Sanders, Ruth Volberding, C. L. Treadway, Irene L. Treadway, Mildred M. Burton, Robert E. Burton, Dora Tillotson, Edith H. Stenson, Harold H. Fichtner, Leah Fichtner, Nancy H. Reid, Josephine Merl, Nellie Kibbey, Catherine C. Kent, W. C. Gossedge, Margaret S. Abbey, W. Edward Johnson, Harlan G. Refvem, Eugene Herrbach, Margaret Herrbach, Dorothy Humphrey, Helen E. Butler, Claude Lewis, Harold L. Stout, Winifred Stout, Margaret E. Grimes, Marie J. Wilson, Helen M. Wilkerson, Warren L. Wilkerson, Juanita Sisk, Betty Foley, Leo Zeek, R. R. Sullivan, Dorothy W. Henderson, Ruth Black, Ruth Freund, Agnes Angel, Frances Merz, Marguerite Duston, Ovid Duston, Lila J. Keegan, Edith P. Dobbins, Lucille Hodge, Gertrude Boss, Janet Fleischman,

Don L. Berger, Adele Kuchenbuch, James T. Argenbright, Frances L. Argenbright, Otto W. Knutson, Thelma J. Grammer, Irene C. Burns, Helene M. Brink, Virginia R. Allen, Derrill Costley, Dorothy Costley, Ingeborg Carlson, Velma M. Copeland, Mary Wallace, Betty Krebs, Ita C. Daugherty, Edith H. Stenson, Richard R. Manifold, O. M. Johnson, Florence Johnson, Glenn Miller, Nellie Miller, Max Sheldon, Reta Sheldon, William H. Perkins, Mabel E. Wayne, Lois Morrison, Mervin M. Morrison, James A. Weber, Stewart F. Hovey, Dail Adkins, C. G. Zimmerman, Armin Witthar, Pauline Blosser, Phyllis R. Snead, Mildred C. Burke, Margaret Fowler, Marian D. Vaughan, Barbara Swinney, C. Mildred Johnston, Everett O. Johnston, Nora M. Witthar, Freda E. Fraas, Viola M. Combs, Myra Gregg, Bernice Raines, Elizabeth Barter, Murel C. Kemph, Evelyn F. Kemph, Hilda Graham, Louise M. Hamilton, Edith Talbot, Harry H. Simpson, Thomas E. Pendleton, Nadean L. Pendleton, O. W. Hughes, Viola R. Farris, Nadine Hodges, Arthur W. Talbot, Dr. R. A. French, Louise O. Carpenter, Ralph Heinman, Grace Heinman, Pauline Creten, Grace A. Wahlstedt, Marie Morris, Frances Heft, Helen Billow, Helen K. Blackburn, Helen Staats, Mary Ellen Simpson, Elizabeth M. Greene, Maude Brown, Marie Tompson, Anna Henger, Eleanor Heitland, Allene McKenna, Roberta I. Cox, Susan Wade, Bertha Needham, Eva H. Evans, Esther Morse, Gladys Rosenkrantz, Edith Vespestad, and Mrs. Clay C. Rogers.

The plaintiffs in *Sandford* v. *Berg* are the following individuals: Dan R. Sandford, Jr., Aline E. Sandford, Faye Akright, Elizabeth Anstey, Mildred B. Baker, Ralph E. Baker, Florence M. Baker, Irene H. Barger, Franziska Bartsch, Otto W. Beaman, Ruth L. Beaman, Mary B. Beazley, Arthur H. Birk, Frances B. Birk, Lucille G. Brackman, E. C. Brown, Lelia M. Brown, Edna C. Burch, Helen L. Burrus, Jesse L. Campbell, Marie M. Campbell, Revilla Campbell, Lena Carter, Emma Cartmell, Lloyd T. Christie, Harriet H. Christie, Flo L. Church,

Dorothy Conway, Almon B. Coover, Dorothy E. Dale, John P. Dallam, Ann Dallam, Edwin C. Davis, Grace K. Davis, Chester L. Davison, Ralph G. Dick, Robert Dunbar, Ralph E. Durham, Geraldine L. Ellis, Mary Ann Flippo, Alta Flottman, Dorothy W. French, John T. Gascich, Victorine A. Gascich, Hazel E. Gossadge, Katherina E. Guinn, Emily F. Gunther, George M. Haller, Edna Haller, Beatrice Hamilton, Hazel Hanson, John C. Harris, Sarah B. Harris, M. Eugenia Haydon, Elizabeth Heinz, Ralph Henger, Elizabeth L. Hilburn, Mitzi K. Hiller, Catherine L. Hoeft, Russell R. Howell, Elizabeth Howell, Kate Hull, Ilene Jacques, Dortha Jenkins, Lucille H. Jenkins, Mary M. Johnson, Gearl King, Michael D. Konomos, Edna M. Konomos, Kathryn D. Kules, Opal J. Laird, Phillip Lamb, Elbert W. Landfried, Elina Landfried, Theressa Lappine, Anna M. Lenz, Irma Lile, Helen Link, Edward J. Mantel, Bernice J. Mantel, Raymond A. Mattson, Bessie Merle Mattson, Sara E. McCann, Louise McCoy, Frances McCune, Ruth E. McIntosh, Annabell W. Merrell, Alfred E. Michael, Frederic N. Miller, Frances Mollenkamp, Maud E. Moore, Maude E. Morris, Hazel R. Musick, Arthur J. Nelson, Jr., Mable T. Nelson, Patrick H. Nugent, Harriette H. Nugent, Vernon A. Patton, Marvin A. Pegram, Mildred E. Pegram, Mildred W. Pippitt, Marion E. Poe, Ethel Refvem, Gertrude Pollom, Marie E. Pryor, Loretto L. Rabinovitz, Helene A. Reckards, Elsie Reinicke, Selma B. Reinicke, Algin O. Richardson, C. S. Robinson, Geraldine Robinson, Eber Roush, Record S. Rowland, Helen L. Rowland, Georgia Saunders, Virginia L. Self, Wayne Shadowen, Alice Shadowen, Elsie T. Shields, Dorothy L. Shumate, Marjorie Smethers, Estelle Smiley, Martha Smiley, Edwin S. Smith, Erma Smith, Nicholas G. Smoley, Ona N. Smoley, John F. Stemmerman, Hortense C. Stemmerman, Floyd J. Stover, Rachel Stutzman, Gladys M. Sullivan, Esther Swanson, Mildred R. Swenson, Nadine D. Tawson, Dollie M. Taylor, Sara Taylor, Ora A. Thee, Olive I. Thomas, Henrietta Thorp, Ruth Triplett, Ermalee Trost, H. D. Tucker, William B. Turnbow, Elmer R. Turner,

Herschel H. Varney, Enid L. Walker, Lillian Ward, Lilyan G. Warner, Henry P. Wetmore, Marion W. Wetmore, Lee L. Wharton, Maxime A. Wharton, Irma V. White, Jessie M. Whitmore, Ethel H. Williams, Richard N. Windsor, Mary B. Wineland, Belle Worlow, Evelyn M. Worley, Dilbert L. Yeagley, Mary K. Yeagley, Belle Zimmerman, Boyd R. Zuber, Marke C. Zuber, and Edna Houston.

No. 83-587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

CLARENCE E. BENNETT ET AL.,
Respondents.

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

DAN R. SANDFORD, JR., ET AL.,
Respondents.

(Consolidated)

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUPPLEMENTAL APPENDIX

Pursuant to Rule 28.1 of the Revised Rules of the Supreme Court of the United States, Petitioner, The Prudential Insurance Company of America ("Prudential"), states that it has the following subsidiaries which are not wholly-owned:

1. Sony Prudential Life Insurance Co., Ltd.
2. John Street Syndicate, Inc.
3. Essex Syndicate, Inc.
4. Prudential-Bache Securities, Inc.
5. Halsey Stuart Corporate Services, Ltd.
6. Bache Inversiones, S.A. (Spain)
7. Bache Securities (Hong Kong) Limited
8. Bache Halsey Stuart Shields (U.K.) Ltd. (Hong Kong)
9. Bache & Co. (Italy), Inc.
10. Shields Model Roland Company (London)
11. Bache Halsey Stuart Commodities, S.A. (France)
12. Bache Securities (France) S.A., and
13. 745 Property Investments

Prudential further states that it has no parent corporation and no affiliated corporations other than holdings for investment purposes and wholly-owned subsidiaries.

CERTIFICATE OF SERVICE

I, James G. Ulmer, a member of the Bar of this Court, do hereby certify that a copy of the foregoing Supplemental Appendix was mailed via U.S. Mail, first class, postage prepaid, certified, this 4th day of November, 1983, to:

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No. 83-587

IN THE

Supreme Court of the United States

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DAN R. SANDFORD et al.,
Respondents.

(Consolidated)

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Must the writ sought by petitioner be denied where petitioner seeks to review a Court of Appeals decision that the complaint states a RICO claim against petitioner and the complaint is not before this Court?

2. Must the writ be denied where none of the reasons for granting such a writ is present?

3. Do the civil provisions of RICO afford respondents a damage remedy against a business organization such as petitioner which has conducted, and strongly participated in the conduct of, the affairs of an enterprise through a pattern of racketeering activity, thereby causing millions of dollars of direct injury to the respondents?

4. Do the civil provisions of RICO afford respondents a damage remedy against a business organization such as petitioner which has conspired with others to conduct, or participate in the conduct of, an enterprise through a pattern of racketeering activity, thereby causing millions of dollars of direct injury to the respondents?

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
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DAN R. SANDFORD et al.,
Respondents.

(Consolidated)

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The petition's description of the opinions below omits to state that both the panel opinion and the *en banc* opinion of the Eighth Circuit were *unanimous* with respect

to the RICO Act count alleged by the plaintiffs against the petitioner (and thirty-one other defendants). The only dissent, which appears in the *en banc* opinion, relates solely to a different count, which was alleged against a different defendant.

STATEMENT OF THE CASE

Even though petitioner Prudential seeks to persuade this Court that plaintiffs' complaint does not state a claim against it under the RICO Act, Prudential has failed to include the complaint in its appendices.* The omission, which at first blush seems extremely strange, makes it easier for Prudential to misrepresent the facts here, as by suggesting that this case involves nothing more than "garden-variety civil misrepresentation, anticipatory breach of contract, and consumer claims" or "ordinary commercial litigation." (Pet. at i, 11.) Nothing could be farther from the truth. What is involved here, as the following summary shows, is an enormous, sophisticated, nationwide, criminal fraud which has cheated thousands of elderly people out of many millions of dollars, and in which Prudential played a central role.

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* As we point out later, this omission is itself reason for denying the petition, since there is nothing before the Court which would permit it to deal with the issues raised.

Because the complaint is lengthy (forty-nine legal-size pages, containing 122 paragraphs), it would cost plaintiffs more than $1,500 to print it as an appendix. Because of their limited funds, plaintiffs cannot afford to do so.

There were 408 plaintiffs in this litigation originally, all of them elderly residents of a retirement community. Fifty-five plaintiffs have died during the three and a half years the litigation has been pending. The average age of the surviving plaintiffs is believed to be about eighty. Many of them, as one would expect, are in poor health—a fact which has special significance here, for reasons explained below. At the time the litigation was commenced, all of the plaintiffs were residents of a "life-care" retirement community known as John Knox Village located in Lee's Summit, Missouri. John Knox Village is the largest life-care retirement community in the country; at the time the litigation was commenced, the Village was the size of a small town, having more than 2,500 residents.

Subsequent to the commencement of the litigation, some of the plaintiffs moved out of the Village, in most cases because of the grave financial condition of the Village and other problems resulting from the defendants' massive fraud. Many of the remaining plaintiffs are unable to leave the Village because their financial investment in the Village left them without the financial resources to do so.

The Criminal Defrauding Of The Plaintiffs

There are thirty-three defendants. (Only Prudential has sought *certiorari*.) All of the defendants, including Prudential, were involved in the ownership, management or operation of the Village, and in the tragic injury which has been suffered by the plaintiffs.

The two central defendants are Kenneth Berg and Prudential. Berg is an ordained Presbyterian minister who founded the Village and controlled it for many years. Berg promoted the Village as a religiously oriented community and a safe, secure investment—a place where the

retired elderly could spend the rest of their years in peace and security, receiving numerous services and benefits *for life.**

"Life-care" was what was advertised. Claiming to be motivated by such noble considerations as "the spirit of Christ" and "the Golden Rule . . . which makes it possible for all of us to live together as a happy Christian family," and emphasizing his "purpose in being involved in this retirement home movement as a minister is not to provide shelter alone, but spiritual care, nurture and oversight at a time when people need it most," Berg, together with his cohorts, promoted life-care at the Village from coast to coast. Religious names were constantly used in connection with the ownership and operation of the Village, such as John Knox Village, Evangelical Christian Social Services and Christian Services International, Inc.—all of which were profit-making organizations controlled by Berg.

The promotions coupled these religious themes with the most categorical assurances as to economic and financial soundness and honesty in the operation of the Village. Prospective residents were told, for example, that "a nonprofit motive in dealing with the needs of Senior Citizens was to be preferred. Why should individuals profit hugely off the suffering of the aged?" They were told, over and over again, "that John Knox Village is financially

* Berg is presently under indictment in Alabama for fraud in connection with a retirement home in that state. He is also being sued or under investigation by a number of other states and earlier this year was the subject of a Federal Trade Commission complaint and cease and desist order relating to many of his fraudulent practices in connection with John Knox Village and other retirement homes or communities with which he has been involved. *See In the Matter of Christian Services International, Inc.*, 3 Trade Reg. Rep. (CCH) ¶ 22,009 (F.T.C. File No. 7823081, announced April 25, 1983).

sound," that the Village's auditor (defendant Snyder, Grant & Muehling) and defendant Prudential "say we are financially sound," and other words to the same effect. Not only was the Village financially sound, it also "will be kept on a sound financial basis, and it will be reviewed regularly by people who care about you." "Certain checks and balances protect the applicant's interests *and investment* in this Unique Plan." (Emphasis added.)

These nationwide promotions were enormously successful. Thousands of elderly persons, including the plaintiffs—widows, widowers, retired couples—streamed into the Village from all over the country* and purchased life-care contracts. Those contracts required the payment of an initial lump sum, commonly called an Entrance Endowment, ranging in amount from approximately $9,000 to more than $50,000, plus a substantial monthly charge commonly referred to as a Monthly Service Charge. The contracts promised the plaintiffs (and other Village residents) the right to occupy specified housing units in the Village and to receive numerous services and benefits *for life*—in short, life-care. Not a few of the plaintiffs paid all or most of their life savings as their Entrance Endowment for life-care, a principal element of which is the promise of *unlimited nursing home care* at the Village for those who require it, at no charge except for certain incidentals such as food and drugs.

As the Court is aware, the fear that prolonged nursing home care will be required, and that it will be beyond

* The uncontradicted facts in the court record below show that a large number of the thousands of present and former residents of the Village, including many of the plaintiffs, resided outside Missouri at the time they moved to the Village; that throughout its existence, advertisements for the Village have been carried by newspapers, radio, television and direct mailings outside Missouri; and that salespersons for the Village regularly traveled outside Missouri to promote the Village and sell life-care contracts.

one's financial means, haunts the elderly. But the plaintiffs and other prospective residents of John Knox Village were promised that this fear was one that would be irrelevant to them. The nationwide promotions of the Village stressed this—emphasized that what they were being offered and what they would be buying was "the precious peace of mind that comes with LIFE-CARE" and that "AT OUR LIFE-CARE COMMUNITY YOU CAN LIVE IN A BEAUTIFUL APARTMENT AND NEVER WORRY ABOUT LOSING IT OR PAYING A MAJOR MEDICAL BILL FOR THE REST OF YOUR LIFE." (Emphasis in originals.) As one pamphlet summed up the "Village Life-Care" which was being promoted and sold:

> "Life-Care is simply a written guarantee to you that all the many facilities and services of the Village explained below will be at your disposal for life once you are one of our residents."

This is what the plaintiffs were promised, this is what they bargained for and thought they were purchasing, and this is what they have paid many millions of dollars for.*

The true facts, however, were quite different, tragically different. As the complaint alleges, in the minds of Berg and his associates, the Village was little more than a fraudulent vehicle by which they unlawfully enriched themselves in numerous ways, and for the most part secretly, at the expense and to the great damage of the plaintiffs and others who purchased life-care contracts. The 122-paragraph complaint details how the Berg group milked the Village in countless ways, fraudulently diverting millions which had been paid for life-care into their

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* Moreover, a typical life-care contract assured prospective residents that the Village would be "operate[d] at the lowest possible cost to the Occupant, consistent with sound economic principles."

own pockets and into other of their ventures. Throughout the relevant period here, and contrary to representations which were made, the reserves *without which life-care could not possibly be provided* were not being set aside, because of these fraudulent diversions. What occurred here was the same as if those in control of an insurance company fraudulently pocketed millions paid as insurance premiums instead of establishing the reserves required to pay future benefits: For some time, in such cases, the company will be able to pay benefits and conceal the fraudulent diversions by using incoming premiums to pay benefits, but at some point that becomes no longer possible and collapse becomes unavoidable.

The result of all of this is that, after the payment of over $75 million in Entrance Endowments and Monthly Service Charges by plaintiffs and other residents, the Village is insolvent, on the verge of bankruptcy and financially nonviable. Plaintiffs and other residents have experienced a marked deterioration of services and benefits, together with large increases in their Monthly Service Charge, all because millions which had been paid in to fund their life-care were stolen.

Plaintiffs are prepared to show at trial that the Village was pervasively fraudulent and financially nonviable when plaintiffs were induced to purchase their life-care contracts, that the financial condition of the Village has worsened drastically since this litigation was commenced, that the future of the Village is hopeless, and that, as a consequence, the plaintiffs, all of whom came to the Village and invested large sums in it under the deliberately promoted impression that it was a religiously oriented, honestly run, financially secure place where they could spend the remainder of their lives with security and dignity, are now faced with the tragedy of collapse of the Village and the loss of their homes, their life-care and the

millions of dollars they paid for life-care. *At no time during the three and a half years of this litigation has Prudential or any other defendant ever denied the hopeless financial condition of the Village as a life-care community.* Were it not for the pendency of this litigation and the dramatic effect on the litigation of an outright collapse of the Village, such a collapse would have been permitted to occur long ago.

Plaintiffs would emphasize that this tragedy is not the result of mere mismanagement, miscalculation or incompetence, but, rather, of deliberate nationwide, criminal fraud, as alleged in the complaint, perpetrated both in the inducement of the plaintiffs to purchase life-care contracts and move to the Village, and in the operation of the Village.

***Prudential's Participation In The Fraud**

In a petition dominated by misrepresentations, the worst is the contention that Prudential did no more than act as mortgage lender. The complaint tells a far different story, as is now summarized.

Prudential had great legal powers over the Village, Berg and his companies by reason of the provisions of the mortgage documents. In addition, Prudential had enormous *de facto* power over them, stemming from Prudential's ability to grant or withhold the millions of dollars of loans on which they were completely dependent. This combination of legal and *de facto* powers gave Prudential the virtual-

* On October 14, 1983, after the remand by the Eighth Circuit, plaintiffs filed an amended complaint with the District Court. The amended complaint contains a long, detailed section describing Prudential's central role in the fraud complained of. These allegations are in large part based on information not available to plaintiffs when this litigation was commenced but which was obtained through discovery prior to the dismissal by the District Court.

ly unlimited power to control the affairs of the Village, Berg and his companies, including the operation, management, marketing practices and finances of the Village.

Prudential frequently exercised this power, including the constant support of the fraudulent conduct discussed earlier in this brief. The fact is that, as a practical matter, those in immediate charge of the affairs of the Village could not do anything of importance without Prudential's approval. This condition continues to exist at the present time.

The complaint alleges at length Prudential's role in conducting and participating in the conduct of the affairs of the Village, and its role as a co-conspirator with Berg and others in the commission of the fraudulent acts complained of through a pattern of racketeering activity (numerous mail and wire fraud violations). The complaint alleges how Prudential was responsible for maintaining Berg in control of the Village, and describes in great detail how Prudential, even as late as 1978, when there could be absolutely no doubt as to its knowledge of the massive fraud which had been committed, engaged in many determined efforts to support Berg and his cohorts and the criminally fraudulent conduct in which they had been engaged; to conceal this unlawful conduct from the Village residents, prospective purchasers of life-care contracts and others; and to lull those persons into a belief that all was well and that there had been no wrongdoing. This continued even after some of the residents, having become suspicious and concerned, banded together in 1978 to attempt to uncover wrongdoings which had been committed and to protect their rights. Prudential's reaction was to seek to thwart these efforts, all pursuant to the unlawful conspiracy mentioned above. Several specific examples of Prudential's efforts in this regard are detailed in the complaint.

This conduct by Prudential was due to its heavy financial involvement with Berg and his various ventures, and Prudential's desire not to do anything which might jeopardize that relationship or the more than $75 million which Prudential had invested in those ventures. *In essence, Prudential was Berg's partner.* The closeness of the relationship is indicated in part by the fact, as alleged in the complaint, that when Prudential's national General Manager, Real Estate Investments, retired in 1973, he went to work as Director of Public Relations at the Village and also became Executive Vice President of Christian Services International, Inc., which was Berg's company that controlled and managed the Village during the relevant period.

On top of all this, as the complaint emphasizes, throughout its long relationship with the Village prior to the commencement of this litigation, Prudential knowingly permitted Berg to falsely represent to purchasers and prospective purchasers of life-care contracts that Prudential would ensure the financial stability and economic survival of the Village, and to falsely hold out Prudential's name and supposed oversight of the Village's finances and other affairs as assurances of the sound financial condition of the Village and the propriety and honesty of the way its affairs were conducted. At the trial of this litigation, plaintiffs will show that these fraudulent uses of Prudential's name, which Prudential knowingly permitted and even encouraged, were a material factor in the decisions of many plaintiffs to purchase life-care contracts.

In view of these facts, Prudential's contention that it is being charged with fraud under RICO merely because it was a mortgage lender to the Village is frivolous. What the facts in the complaint show is that, as we stated earlier, Prudential played a central role in the massive fraud here, along with its partner, Kenneth Berg.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO PRESENT THE COURT WITH ANY FACTUAL BASIS FOR DECIDING THE QUESTIONS SOUGHT TO BE REVIEWED.

It is obvious that it is impossible to decide whether the Eighth Circuit's decision that the complaint states a RICO claim against Prudential should be granted review without the complaint being before the Court. Yet, as we pointed out earlier, Prudential (revealingly) has failed to include the complaint in its appendices. Neither the panel opinion nor the *en banc* opinion below is sufficient for this purpose, since they fail to disclose most of the crucial allegations of the 122-paragraph complaint and instead merely allude to some of the allegations in the most cursory fashion.

For this reason alone, the writ should be denied.

II.

THE "QUESTIONS PRESENTED" IN THE PETITION MISCHARACTERIZE THE FACTS HERE.

This reason for denying the writ is closely related to the preceding reason (petitioner's failure to include the complaint in its appendices) since the central question stated in the petition:

> "1. Does the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1976 & Supp. V 1981), create a federal treble damage cause of action and a federal forum for garden-variety civil misrepresentation, anticipatory breach of contract, and consumer claims?"

is based on fiction rather than fact, as is graphically made plain by our statement of the case.

The same is true of the other two "questions presented" in the petition:

> "2. Does this Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981) compel the federal courts to grant standing, jurisdiction, and a cause of action to consumers who cannot allege any commercial harm proximately caused by a violation of the Act but, to the contrary, seek treble damages for alleged mail fraud?
>
> "3. Is a mortgage lender deemed as a matter of law to be 'associated with' its borrowers within the meaning of the statute so as to make it liable for their alleged misconduct?"

It is difficult to understand what the petitioner thought it would achieve by so mischaracterizing the facts here. Regardless of what it had in mind, however, these questions bear no relation to the actual facts in this litigation.

III.

NONE OF THE REASONS FOR GRANTING SUCH A WRIT IS PRESENT HERE.

None of the reasons set forth in Rule 17 of this Court's rules exists here. Nor does any other reason exist for granting the writ. Practical evidence of this is found in the fact that, of the thirty-three defendants in this litigation, only Prudential has sought the writ.

Petitioner's efforts to create the impression that there is conflict or at least disarray among the circuits is transparently without merit. The facts are that the Eighth Circuit's *en banc* opinion was unanimous on the issues involved here, and every Court of Appeals which has considered the questions posed by petitioner has unanimously

rejected petitioner's contentions. *See Moss v. Morgan Stanley*, No. 83-7120, slip. op. at 20-30 (2d Cir. Sept. 9, 1983); *Schacht v. Brown*, 711 F.2d 1343, 1350-61 (7th Cir. 1983). The Sixth and Eleventh Circuits have also upheld the applicability of civil RICO in business contexts and in doing so implicitly rejected petitioner's contentions. The Sixth Circuit, in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), affirmed the issuance of an injunction sought in a shareholders' civil RICO action founded on the conduct of a corporate promoter. The Eleventh Circuit, in *Morosani v. First National Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983), overruled limitations on RICO adopted by the district court in *Kleiner v. First National Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981), and reinstated the RICO complaint of a borrower against a bank. Moreover, three *other* circuits have held a link to organized crime is not necessary for a *criminal* RICO action. *See U.S. v. Vignola*, 464 F.Supp. 1091 (E.D. Pa. 1979), *aff'd.* 605 F.2d 1199 (3d Cir. 1979); *U.S. v. Grande*, 620 F.2d 1026, 1030 (4th Cir. 1980); *U.S. v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977); *U.S. v. Campanale*, 518 F.2d 352, 363 (4th Cir. 1975). These decisions in RICO criminal cases are relevant for the reason that the essential elements of both criminal and civil RICO violations are identical.

Similarly uniform in rejecting petitioner's contentions are all of the scholarly commentators who have dealt with these issues. *See, e.g.*, Blakey, *RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 Notre Dame L.Rev. 237 (1982); Strafer, Massemi and Skolnick, *Civil RICO In The Public Interest: "Everybody's Darling,"* 19 Am.Crim.L.Rev. 655 (1982); Note, *RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 Harv.L.Rev. 1101 (1982). Especially significant is the

referenced article by Professor G. Robert Blakey, who, as Chief Counsel of the Senate Subcommittee on Criminal Law and Procedure of the U. S. Senate, was the principal draftsman of the RICO statute. *U.S. v. Lee Staller Enterprises, Inc.*, 652 F.2d 1313, 1319 n.10 (7th Cir. 1981).

There are two additional reasons for denying the writ sought here. One is that this Court has traditionally declined invitations to decide issues of the type raised by the petition in the absence of a factual record. No such record exists here, of course. The other reason for denying the writ is the very advanced age of the plaintiffs. Fifty-five plaintiffs have already died since this litigation was commenced three and one-half years ago. The litigation was pending in the Court of Appeals for more than two years. If this Court were to grant the writ, how many plaintiffs will be alive when the Court renders its decision on the merits? How many more plaintiffs will have become so old or so ill that they will be unable as a practical matter to have their day in court?

IV.

THE EIGHTH CIRCUIT'S REFUSAL TO ENGRAFT COURT-MADE LIMITATIONS ON RICO IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE AND DECISIONS OF OTHER CIRCUITS.

Distilled to its essence, Prudential's position is that this Court should amend the RICO Act in several respects. All of Prudential's contentions were rejected by the appellate decisions and scholarly commentators referred to in the preceding section of this brief, including most emphatically by the principal draftsman of the statute. The circuits' unanimous conclusion that business crimes should not be exempted from RICO and that petitioner's other contentions should be rejected reflects the fact that the

statute is unambiguous. Absent "clearly established legislative intent to the contrary," the plain language of RICO must be deemed conclusive. *U.S. v. Turkette*, 452 U.S. 576, 580 (1981). And here, there is no legislative intent to the contrary. The history of the statute shows Congress's intention that RICO be enforced as enacted, and that is what all of the Courts of Appeals which have dealt with these issues have done. Their decisions are consistent with the congressional directive that, "The provisions of this title shall be liberally construed to effectuate its remedial purposes." 18 U.S.C. §1961. (Pub.L. 91-452, Title IX, Section 904, 84 Stat. 94.)

Petitioner's suggestion that guidance from this Court is needed since RICO brings the federal government into areas that formerly were the sole province of the states is misguided. This Court has already provided such guidance: "[T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure." *U.S. v. Turkette*, *supra*, 452 U.S. at 586.

This Court and the circuits are therefore unanimous: RICO should be enforced as enacted, unencumbered by any artificial limitations that would effectively create a business-crime exception to its prohibitions and make the civil damage provisions of the statute of illusory value only.

SUMMARY OF REASONS FOR DENYING THE WRIT

In summary, respondents state the following reasons for denying certiorari in this litigation:

1. It is impossible to decide whether the complaint states a RICO claim against Prudential without the complaint being before the Court.

2. The "questions presented" in Prudential's petition assume facts which are totally at odds with the actual facts in this litigation. The actual facts reveal a massive, sophisticated, nationwide, criminal fraud which is precisely the kind of business corruption which RICO was aimed at.

3. Neither the reasons set forth in Rule 17 of this Court's rules nor any other reason for granting the writ is present here. Moreover, to grant the writ would be a grave and in some cases fatal disservice to the elderly plaintiffs, who have already endured three and one-half years of wandering through the judicial maze without an opportunity to have their day in court.

4. This Court must respect the congressional intent underlying the RICO Act, a statute which is unambiguous both in language and design. Prudential's contentions, which amount to an invitation to the Court to amend RICO, should be rejected.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

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